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Supreme Court, U. S.
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In the Supreme Court of the United States

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~~72-9~~88

No. —— Misc.

LETA MOORE,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE SUPREME COURT
OF THE UNITED STATES

Term, 19

No. Misc.

LETA MOORE

vs.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Leta Moore, an individual, prays that a Writ of Certiorari issue to the United States Court of Appeals for the Third Circuit to review the judgment of that Court entered October 19, 1972.

OPINIONS BELOW

The Order and Memorandum of the District Court granting the Defendant-Petitioner's Motion for Summary Judgment, entered March 27, 1970, is reported at 311 F. Supp. 984 (M.D. Pa. 1970) and is reproduced herein in Appendix A.

The Order and Opinion of the Court of Appeals, of June 17, 1971, remanding the action for further fact-finding on the question of Defendant's domicile is unreported but reproduced herein in Appendix B.

The Judgment and Opinion of the Court of Appeals, of April 27, 1972 (unreported and later withdrawn), affirming the granting of Defendant's Motion for Summary Judgment, including the dissenting opinion of Kalodner, Circuit Judge, is reproduced herein in Appendix C.

The Judgment and Opinion of the Court of Appeals, of October 19, 1972, reversing the Order of the District Court, including the dissenting Opinion of Biggs, Circuit Judge, is reported at —— F. 2d —— (3rd Cir. 1972) and is reproduced herein in Appendix E.

The Order of the Court of Appeals, of December 27, 1972, denying petitioner's Petition for Rehearing is reproduced herein in Appendix G.

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STATEMENT OF JURISDICTIONAL GROUNDS

On October 19, 1972, judgment was entered in the United States Court of Appeals, Third Circuit, reversing the District Court's granting of summary judgment in favor of the defendant-petitioner.

By Order of November 22, 1972, the Court of Appeals granted the petitioner additional time in which to file a Petition for Rehearing in Banc. By Order of December 27, 1972, petitioner's Petition for Rehearing in Banc was denied. These Orders are reproduced herein in Appendix E and Appendix F.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1), reproduced in Appendix H.

QUESTION PRESENTED

Whether the right of recovery of medical expenses granted to the United States in the Medical Care Recovery Act, 42 U.S.C. 2651, is subject to the operation of state immunity rules preventing tort liability from arising between spouses and between parents and unemancipated minor children.

STATUTE INVOLVED

This case involves the Federal Statute known as the Medical Care Recovery Act, Pub. L. 87-693, September 25, 1962, 76 Stat. 593, 42 U.S.C. 2651 et seq., which is reproduced in full in Appendix H, and in particular the following portion thereof:

42 U.S.C. 2651 (a):

> "In any case in which the United States is authorized or required by law to furnish hospital, medical, surgical, or dental care and treatment (including prostheses and medical appliances) to a person who is injured or suffers a disease, after the effective date of this Act, under circumstances creating a tort liability upon some third person (other than or in addition to the United States and except employers of seamen treated under the provisions of section 249 of this title) to pay damages therefor, the United States shall have a right to recover from said third person the reasonable value of the care and treatment so furnished or to be furnished and shall, as to this right be subrogated to any right or claim that the injured or diseased person, his guardian, personal representative, estate, dependents, or survivors has against such third person to the extent of the reasonable value of the care and treatment so furnished or to be furnished. . ."

STATEMENT OF THE CASE

On July 15, 1965, the petitioner, Leta Moore, was operating an automobile on the Pennsylvania Turnpike when she was involved in a one-car accident. Her husband and three minor children, who were passengers, were injured and required medical treatment. Since the husband was a member of the Armed Forces, the United States was required by the Medical and Dental Care Act, 10 U.S.C. 1071 et seq., to defray the cost of the treatment administered to the husband and children. The United States subsequently brought this action in the Middle District of Pennsylvania under the Medical Care Recovery Act, 42 U.S.C. 2651 et seq., to recover from the petitioner the reasonable value of the care and treatment furnished her husband and children. Jurisdiction of the District Court was based on 28 U.S.C. §1345 and 42 U.S.C. §2651(b).

The petitioner, assuming her own negligence for purposes of the motion, moved for summary judgment, which the District Court (per Nealon, D.J.) granted. The Court held that although the government's right of recovery was "independent", it was nevertheless subject to the express statutory condition precedent of "circumstances creating tort liability upon some third person to pay damages". The District Court, having found nothing in the statute defining "circumstances creating tort liability" and having determined that it had no power to define the statutory terms itself, looked to state law. Since the Moores

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were domiciliaries of Maine, the District Court applied that law to the parties involved.

Under the law of Maine, a wife and mother is not liable in damages for her negligent acts which result in personal injuries to her husband and unemancipated minor children; *Abbott v. Abbott,* 67 Me. 304 (1877) (no liability between spouses); *Downs v. Poulin,* 216 A. 2d 29 (Me. 1966) (no liability between parents and unemancipated minor children). After determining the status of Maine law, the District Court concluded that since the petitioner could not be liable in an action in Maine brought by the injured persons, the statutory condition precedent was not fulfilled. Therefore, it was held that the United States could not recover from the petitioner.

The United States appealed to the Court of Appeals for the Third Circuit, which affirmed the decision of the District Court by a divided vote. The majority determined that the District Court was correct in referring to state law and correctly assessed the applicable law. The dissenting opinion (per Kalodner, J.) took the position that the "independent" right of recovery given to the United States was not subject to the "vagaries of state immunity doctrines" (Appendix C, pp. 31a-32a).

The Petition of the United States for a rehearing was granted and the original opinions were withdrawn (Appendix D). The same panel then reversed the District Court's Order, again by a divided vote. The majority (Kalodner, J. and Whipple, D.J., sitting by designation) took the same position as that set forth in the earlier dissent of Kalodner, J., holding that the "independent"

right of the United States under the statute is not subject to the "vagaries" of state immunity doctrine (Appendix E, p. 48a). The dissent (per Biggs, J.) argued that the position of the majority has the unavoidable effect of establishing a Federal standard of tort liability, which was beyond the reach of the Federal judicial power to create. Judge Biggs once again asserted that under Maine law, the petitioner could not be held liable on these facts and, therefore, the condition precedent to the United States' right of recovery was not fulfilled.

The petitioner's request for a rehearing in banc was denied. She thereupon brings this Petition for Writ of Certiorari.

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REASONS FOR GRANTING THE WRIT

1. Federal Statute and Important Question of Federal Law Which Have Not Been Reviewed by This Court

The Medical Care Recovery Act, 42 U.S.C. 2651 et seq. (hereinafter referred to as M.C.R.A.), is a Federal statute not heretofore considered by this Court which was belatedly (1962) enacted as a result of this Court's decision in *United States v. Standard Oil Co.*, 332 U.S. 301 (1947), wherein it was held that it was for Congress, not the judiciary, to create a right of recovery in favor of the United States for medical services furnished a soldier, necessitated by the negligence of another. In view of the large number of United States military personnel and dependents, the application of the M.C.R.A. is frequent and widespread as alone evidenced by the numerous cases already decided: 28 U.S.C.A. 2561 et seq.

The construction of that statute, and in particular the following condition precedent therein, is at issue:

42 U.S.C. Section 2651 (a):

> "In any case in which the United States is authorized or required by law to furnish hospital, medical, surgical, or dental care and treatment . . . to a person who is injured or suffers a disease . . . *under circumstances creating a tort liability upon some third person to pay damages therefor,* the United States shall have a right to recover from said third person the reasonable value of the care and treat-

ment so furnished or to be furnished . . ." (Emphasis added.)

The resolution of that issue to date has involved consideration of the *Standard Oil Case,* supra, and *Erie R. R. Co. v. Thompkins,* 304 U.S. 64 (1938).

Despite the clear language of the statutory condition precedent to the government's right of recovery, the majority decision of the Third Circuit in this case has held that the United States is not subject to the inter-spousal and intra-family immunity laws of Maine. Unless there is a Federal common-law tort liability, the Court in so holding ignores the condition of the M.C.R.A. which requires, prior to recovery by the United States, that a person be injured under "circumstances creating tort liability in some third person to pay damages therefor", because under the law of the State of Maine, the domicile of the parties, there is no tort liability between wife-petitioner and her husband and parent petitioner and her unemancipated children: *Abbott v. Abbott,* 67 Me. 304 (1877); *Downs v. Poulin,* 216 A. 2d 29 (Me. 1966). By disregarding that state law, an important question of Federal law that should be decided by this Court is raised: Construction of the M.C.R.A. and its statutory condition precedent including whether the cause of action created thereby is subject to Federal tort law or state tort law.

In addition to this being a case of first impression involving a Federal statute and Federal question thereunder which have not been considered by this Court, petitioner also submits that in view of the numerous military personnel and dependents, there will be many of the same and similar type cases in the future.

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2. Decision of Third Circuit Conflicts With Decisions of That Circuit and Other Circuits

In concluding that because the right of the United States is independent (not questioned by petitioner), it is not subject to the vagaries of state immunity law, the majority opinion of the Third Circuit fails to distinguish between the independent right versus subrogation and the statutory condition of injury to a person "under circumstances creating a tort liability upon some third person to pay damages therefor" to which that independent right is subject. As a result, the decision conflicts with decisions of that and other Circuits for in all other cases the condition precedent was met. Furthermore, conflict exists because the reasoning of those cases clearly indicates that if the condition precedent had not been met, the United States would not recover.

The majority opinion relies on the following cases: *United States v. Gera,* 409 F. 2d 117 (3rd Cir. 1969); *United States v. Merrigan,* 389 F. 2d 21 (3rd Cir. 1968); *United States v. Haynes,* 445 F. 2d 907 (5th Cir. 1971); *United States v. Housing Authority of the City of Bremerton,* 415 F. 2d 239 (9th Cir. 1969); *United States v. York,* 398 F. 2d 582 (6th Cir. 1968); *United States v. Fort Benning Rifle and Pistol Club,* 387 F. 2d 884 (5th Cir. 1967).

Those cases conflict with the present case for in each the condition precedent of "tort liability . . . to pay damages" was met. Under the state law involved, the defendant was, *at the time of injury,* liable to pay damages to the injured party. The circumstances involved

created tort liability. Since the condition was met and the right of the United States is independent and not by subrogation, defenses which did not relate to the *creation* of tort liability between the injured party and the defendant did not prevent recovery by the United States. So, in *Gera* (3rd Cir.), supra, and *Fort Benning* (5th Cir.), supra, tort liability existed initially and, therefore, statute of limitations did not bar the United States. In *Merrigan* (3rd Cir.), supra, and *York* (6th Cir.), supra, tort liability existed initially and, therefore, prior judgment and settlement respectively made by the injured person with the third person did not bar the United States. In *Haynes* (5th Cir.), supra, wherein the injured person was the wife of the tortfeasor, tort liability existed on the part of the husband for injuries to his wife and, therefore, the fact that he was entitled to collect her medical expenses and could not sue himself did not bar the United States. Finally, in the *Bremerton* case (9th Cir.), supra, tort liability existed between the injured infant child and the housing authority and, therefore, the contributory negligence of the parents of the child, who would have been entitled to the medical expenses but for their negligence, did not bar the United States from recovery. To repeat, in each case, the condition precedent had been met. In the present case, however, that condition is not met because, as indicated above, no liability arises under the law of Maine on the occurrence of a tort involving spouses or a parent and unemancipated minor children.

The present decision also conflicts with the express and implied reasoning of the other cases on which it relies and in particular those of *York*, supra, *Fort Benning*, supra, and *Bremerton*, supra. In all of those cases, it is clear-

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ly indicated that if, as here, the condition of the M.C.R.A. were not met, the United States could not recover. In *Fort Benning*, supra, where it was held that a statute of limitations, which serves only to extinguish prior existing tort liability, would not bar the United States, the Court stated at page 887:

> "Thus, the United States, under this Act, 'stands in the role' of a subrogee only to the extent that its independent right to recover depends upon the determination of state law as to when the circumstances create tort liability in some third person. This right is subject only to those substantive doctrines which create or negate such liability."
>
> * * * * * * *
>
> "We do not attempt here to determine to which state law defenses the United States is subject and to which it is not. Nor do we suggest that the distinction will necessarily fall along the traditional but uncertain line between 'procedure' and 'substance.' "

In *York*, supra, wherein it was held that settlement by the injured party did not bar the United States, the Court stated at page 584:

> "All of the Courts that have applied the Act are agreed, however, that the right of the United States is an independent right, subrogated only in the sense that the person sued by the government must be liable to the injured person in tort."

The Court in the *Bremerton* case, supra, in permitting recovery because the infant child could sue the defendant, although his parents claim for medical was barred under state law, stated at pages 242 and 243 as follows:

"Under the Act, the predicate for the United States recovery is made out when there exists a party upon whom tort liability may be fastened. . ."

"Under Section 2651(a), the United States may recover only where there is tort liability in a third person. Where the injured party is himself negligent and where under state law that contributory negligence absolves the third person from liability, then the United States cannot recover from that third person. This is what the statute must mean. . ."

The reasoning of the *Bremerton* case, supra, has been relied upon by the District Court within that Circuit in the case of ~~*Lee v. Phillips Petroleum Co.*~~, 329 F. Supp. 579, D.C. Montana (1971). In denying recovery to the United States, the Court held that the condition of the M.C.R.A. requiring "tort liability" had not been met because under state law the defendant was not liable to the injured party. The injured party was an employee of the defendant and, therefore, covered by Workmen's Compensation law, as a result of which he had no cause of action under state common law. Of course, the holding of the Third Circuit in the present case is in direct conflict with the *Lee* case, supra, which in turn cites with approval the 9th Circuit *Bremerton* case, supra.

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3. Decision Conflicts in a Way With Prior Decisions of the United States Supreme Court

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In refusing to apply the law of the State of Maine, the majority opinion of the Third Circuit creates a Fed-

District Court case referred to at page 14 is United States v. Gusto Distributing Co., 329 F. Supp. 578, rather than Lee v. Phillips Petroleum Co.

eral common-law tort under the M.C.R.A., which constitutes a conflict with the decisions of this Court in the *United States v. Standard Oil,* 332 U.S. 301 (1947), which lead to the belated enactment of the M.C.R.A. (1962) and *Erie R. R. Co. v. Thompkins,* 304 U.S. 64 (1938).

Since the M.C.R.A. does not define or prescribe any standards of "tort liability" as used in the condition of that statute requiring injury to a person under circumstances creating a tort liability on some third person to pay damages therefor," tort liability must be determined by state law: *Boeing Airplane Co. v. Perry,* 322 F. 2d 589 (10th Cir. 1963), certiorari denied 375 U.S. 984. On the question of state law, petitioner submits that the entire law of the state is applicable because an approach based on substantive and procedural is not practicable in that the "line between 'substance' and 'procedure' shifts as the legal context changes;" *Hannah v. Plumer,* 380 U.S. 460, 471 (1965). Petition recognizes, however, that by analogy to the *Erie* case, it can be argued that only substantive state law is applicable. Nevertheless, in the instant case, regardless of whether all or only substantive state law is applied, the result is the same. The Maine law doctrines of inter-spousal and intra-family immunity are clearly substantive because no cause of action arises between the parties: *Potter v. Schafter,* 211 A. 2d 891 (Me. 1965), at page 892, and *Downs v. Poulin,* 260 A. 2d 29 (Me. 1966), at page 33.

In refusing to apply the law of Maine, the majority opinion of the Third Circuit creates a Federal common-law tort liability between petitioner and members of her

family or otherwise the statutory condition of the M.C.R.A. would not be met. In doing so, the Circuit places erroneous reliance on the *Standard Oil* case, supra. In that case, as the Third Circuit points out (Appendix E, pages 55a-56a), this Court, at page 310, in reference to the right of indemnification therein sought by the United States, stated that such rights should "not vary in accordance with the different rulings of the several states simply because the soldier marches or . . . flies across state lines." In that case, however, the United States was attempting to create a new tort; interference with the government-soldier relationship. This Court simply refused to create such a tort, holding that it was a matter for Congress. Admittedly, the opinion of this Court in that case contains language suggesting the desirability of uniformity by Federal standards (*Standard Oil* case, supra, pp. 305, 306) to which the Third Circuit makes reference (Appendix E, pages 54a-55a) but Congress in enacting the M.C.R.A., did not do so. The *Standard* case, supra, does not hold that there is a Federal tort law which controls whenever the government sues but rather held that the creation of a new cause of action was for Congress. Congress by enacting the M.C.R.A., however, did not create a new tort but merely conferred a right in the United States that arises when a person is injured by conduct that would have been tortious prior to the M.C.R.A. "The cause of action created by the Act therefor, is simply one where rights under the state law become material to the application of a Federal statute;" *Public Law*, 87-693: *An Analysis and Interpretation of the Federal Medical Care Recovery Act* by Eli P. Bernzweig, Esquire, 64 Col. L. Rev. 1257 at page 1263.

Therefore, the majority opinion of the Third Circuit in creating a Federal common-law tort conflicts with the refusal of this Court to do so in the *Standard Oil* case. Furthermore, since the time of the *Erie* case, supra, there has been no Federal common-law tort and to provide one as between the petitioner and her family, to achieve compliance with the statutory condition precedent, conflicts with that case also.

CONCLUSION

Petitioner prays that a Writ of Certiorari be granted because the M.C.R.A. has never been reviewed by this Court, although countless cases have arisen and can be expected to arise thereunder; because the majority opinion of the Third Circuit in the present case conflicts with the facts and reasoning of decisions of that and other Circuits and finally because such majority opinion in refusing to apply state law creates a Federal common-law tort in violation of the decisions of this Court in the *Standard* and *Erie* cases, supra.

Petitioner prays that a writ of certioari issue to the United States Court of Appeals for the Third Circuit to review its judgment of October 19, 1972 and for such additional relief and process as may be necessary and appropriate in the premises.

Respectfully submitted,

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January 12, 1973

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APPENDIX A

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

No. 69-16 Civil

United States of America,

Plaintiff

v.

Leta Moore,

Defendant

MEMORANDUM

Before the Court is a motion for summary judgment pursuant to Rule 56(b) and (c) of the Federal Rules of Civil Procedure by defendant, Leta Moore. The United States has instituted this lawsuit under the Medical Care Recovery Act, 42 U.S.C. §§2651-2653, to recover the reasonable value of the medical care and treatment which it furnished to Sgt. John W. Moore, the husband of Leta Moore, and their three children as a result of an automobile accident on July 15, 1965. At that time, Leta Moore was operating an automobile on the Pennsylvania Turnpike with her husband and children as passengers when,

due to her negligence, the vehicle went out of control and overturned, injuring her husband and children. Since Sgt. Moore was a member of the United States Air Force, he and his children received medical care and treatment at the expense of the United States Government.

Three questions[1] are raised by the defendant in her motion for summary judgment: (1) whether Pennsylvania or Maine law controls; (2) whether the doctrine of inter-familial immunity precludes recovery by the United States from a negligent spouse under the Medical Care Recovery Act for the reasonable cost of medical treatment furnished the other spouse and their children, and (3) whether the Medical and Dental Care Act, 10 U.S.C. §§1071-1085, precludes recovery under the Medical Care Recovery Act, supra.

"All Courts which have considered the question have agreed that the (Medical Care Recovery Act) gives the United States an independent right of recovery against the tortfeasor; the United States is not merely subrogated to the injured party's claim." United States v. Housing Authority of Bremerton, 415 F. 2d 239 (9th Cir. 1969). Defendant contends, however, that a condition precedent to this independent right is the existence of ". . . circumstances creating a tort liability upon some third person * * * to pay damages therefor * * * ." 42 U.S.C. §2651. Reliance is placed by defendant on the doctrine of inter-spousal and parent-child immunity in arguing that there

[1] The defendant also raised the issue of expiration of the Statute of Limitations, but failed to pursue this defense in the present motion. See generally, United States v. Gera, 409 F. 2d 117 (3d Cir. 1969).

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are no circumstances in this case creating tort liability on the part of Leta Moore. The Government, on the other hand, argues that these doctrines are mere procedural defenses and have consistently been restricted to direct suits between members of the family unit.

A preliminary area in this case is a choice of law question, viz., which State's law should govern? As a Federal Court, we are bound by Pennsylvania choice of law principles and, thus, our task is to approach this matter in the same manner as a Pennsylvania State Court. Klaxon v. Stentor Mfg. Co., 313 U.S. 450 (1941). In this case, a career Air Force Officer, his wife and family, domiciliaries of Maine, were injured in a one-car accident while traveling through Pennsylvania. Defendant urges the application of Maine law, although contending additionally that the result will be the same under controlling Pennsylvania Law. The United States urges application of Pennsylvania law, contending that it is the jurisdiction most intimately concerned with the outcome of this litigation.

Simply because interstate parties and events are involved in a lawsuit does not necessarily mean that a choice of law problem exists. "It is fundamental . . . that in order for an interstate transaction to create a problem in the conflict of laws there must be some conflict in the laws of the contact states. If all contact states would reach identical results for identical reasons, if the occurrence had been intrastate in character, there is no rational basis upon which a different result can be reached because a state line has been crossed." R. Weintraub, A Method for Solving Conflict Problems—Torts, 48 Cornell L.Q. 215, 235 (1963). This type of case is a prime example of a

"false conflict" rejected in the past by the Pennsylvania Supreme Court, Kuchnic v. McCrory, 422 Pa. 624 (1966).

In the case at bar, the laws of Pennsylvania and Maine are identical in their interpretation of the doctrine of interfamilial immunity. In Pennsylvania, spouses are precluded from maintaining personal injury suits between each other. Daly v. Buterbaugh, 416 Pa. 523 (1964); Meisel v. Little, 407 Pa. 546 (1962). Similarly, Maine does not permit such actions. Bedell v. Reagan, 159 Me. 292, 192 A. 2d 24 (1963). In addition, Pennsylvania and Maine both preclude suits between an unemancipated minor child and its parent. Parks v. Parks, 390 Pa. 287 (1957); Downs v. Poulin, (Me.), 216 A. 2d 29 (1966). Moreover, Pennsylvania and Maine both rely on the same rationale for their rules. E.g., McSwain v. McSwain, 420 Pa. 86 (1966) (to prevent "friction between spouses"); Daly v. Buterbaugh, supra (to preserve "domestic peace and felicity"); Parks v. Parks, supra ("to promote family unity and avoid family discord and disturbance, . . . (and) possible collusive action. . . ."); Bedell v. Reagan, supra (doctrine based upon "the legal unification of husband and wife and the preservation of domestic peace and felicity."); Downs v. Poulin, supra (such suits would be "disruptive of the family peace, destructive of the enforcement of discipline," citing Pennsylvania authority). Thus, we have a situation where both contact States would each for the same reasons bar a suit between John Moore and his children as plaintiffs and Leta Moore as defendant.

The law of only one State, however, should be applied in this situation. Since the Pennsylvania Supreme Court has already indicated that controlling weight should be placed upon the law of the State of the domiciliaries of

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the parties when dealing with the marital relationship,[2] McSwain v. McSwain, supra, we will rely on Maine law for the controlling legal principles in concluding that "no tort liability exists on the part of Leta Moore arising from this accident." Consequently, the United States may not recover for the medical expenses of John Moore and the Moore children. United States v. Housing Authority of Bremerton, supra; United States v. Fort Benning Rifle and Pistol Club, 387 F. 2d 884 (5th Cir. 1967).

It is of no avail to characterize the doctrine of family immunity as a procedural defense as opposed to a substantive defense as United States v. Greene, 266 F. Supp. 976 (N.D. Ill. 1967), suggests for, as the Supreme Court has recognized, the "line between 'substance' and 'procedure' shifts as the legal context changes." Hanna v. Plumer, 380 U.S. 460, 471 (1965).[3] Likewise, it would violate the plain wording of Section 2651(a) of the Act to hold that the doctrine of family immunity is inapplicable to the present situation simply because this is not a direct suit between husband and wife or parent and child.

The sounder approach is that suggested by the Ninth Circuit in United States v. Housing Authority of Bremerton, supra. In the latter case, the Court focused on the meaning of Section 2651(a) of the Medical Care Recovery Act. The Court stated that "[w]here the injured party is himself negligent, and where under state law that con-

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[2] From this it is also logical to conclude that Pennsylvania would rely on Maine law, where the children are domiciled, for the controlling principles on parent-child tort liability.

[3] The Fifth Circuit Court of Appeals has intimated a similar view in United States v. Fort Benning Rifle and Pistol Club, supra, at 887.

tributory negligence absolves the third person from liability, then the United States cannot recover from that person. This is what the statute must mean, and it is to this situation that the language in Fort Benning and Greene was directed." 415 F. 2d at 243. Since the defense of interfamily immunity has the same absolving effect on third parties as the defense of negligence, the United States is clearly precluded from any recovery from Leta Moore in this case.

In view of the fact the United States must be denied recovery in this case for the foregoing reasons, there is no need for a detailed consideration of defendant's final argument. Suffice it to state that I perceive no substantial conflict between the Medical and Dental Care Act or any danger to the morale of servicemen if recovery in this case were permitted.

For all of these reasons, therefore, the motion of defendant for summary judgment will be granted.

(s) William J. Nealon,
United States District Judge

March 27, 1970

ORDER

Now, March 27, 1970, in accordance with the Memorandum this day filed, it is hereby Ordered and Decreed that defendant's motion for summary judgment is granted.

(s) William J. Nealon,
United States District Judge

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APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19,070

United States of America,

Appellant

v.

Leta Moore

Appeal From the United States District Court
for the Middle District of Pennsylvania

Argued March 18, 1971
Before Biggs and Kalodner, *Circuit Judges*, and
Whipple, *District Judge*

OPINION OF THE COURT
(Filed June 17, 1971)

Per Curiam:

Our order seeking to put on the record facts as to Mrs. Leta Moore's domicile and the domiciles of the in-

jured members of her family, including her husband, at the time of the filing of the suit at bar and at the date judgment was entered by the District Court against the appellant, United States, neither expressly nor by implication decides any relevant issue. The order is designed to procure what may prove to be essential information in respect to an issue of conflict of laws, *i.e.*, what law governs the pending suit.[1], [2] We do not say that we will

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[1] Mr. and Mrs. Moore both submitted affidavits, which were uncontroverted) stating that they were domiciled in Maine at the time of the accident (July 15, 1965, but moved to Plattsburg, New York in June of 1966. See pages 10a-13a of Appellant's Appendix. Neither affidavit states that they acquired a new domicile in New York or that New York was their domicile on January 15, 1969—the date suit was brought. The District Court docket shows Mrs. Moore's address as "3334 Harman Circle, Omaha, Nebraska." It should also be noted that the affidavits were sworn to and subscribed in Nebraska on October 1, 1969. Once again, the record is silent as to whether they were domiciled in Nebraska on January 15, 1969. It is also possible that the parties were domiciled in yet a third unknown state on January 15, 1969. However, it appears that Pennsylvania's only connection with the case is that it is the place where the tort occurred. See *McSwain v. McSwain*, 420 Pa. 86, 215 A. 2d 677 (1966), where the Pennsylvania Supreme Court has ruled that an issue concerning interspousal immunity for tortious conduct should be governed by the law of the domicile of the spouses.

[2] Contrary to the statement in the dissenting opinion that there is "utterly no precedent" for the application of the law of the state of domicile at the date the action was brought or at the date judgment was entered, we think that such precedent does exist. See *Koplik v. C. P. Trucking Corp.*, 27 N.J. 1, 141 A. 2d 341 (1958); *Emery v. Emery*, 45 Cal. 2d 421, 289 P. 2d 218 (1955); *Kjeldsen v. Ballard*, 52 Misc. 2d 952, 277 N.Y. Supp. 2d 324 (1967). Also see *Purcell v. Kapelski*, — F. 2d —, —, note 7

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apply the law of the domicile of any particular member of the Moore family either at the time the litigation was commenced or at the date judgment was entered by the District Court against the appellant, but we deem ourselves entitled to information as to those domiciles. In seeking this information we in no wise bind ourselves, as suggested by the dissenting opinion, to the law of any particular domicile.

The dissenting opinion also suggests that since the District Court applied the law of the state of the Moore family domicile at the time of the accident and since neither party challenged in this court the District Court's application of this rule, we should accept this as the binding law of the case. Thus, the dissent implies that, in reaching our decision as to the applicable law, we should blindly apply a rule of law enunciated by the District Court even if this rule is incorrect. This is, indeed, a novel proposition. The function of our court is to decide cases by applying "correct" rules of law to *facts* determined by the District Court. The adoption of the procedure suggested by the dissenting opinion would go far to undermine this function.[3]

(3 Cir. 1971). There is, however, at least one case which is directly contrary, *viz.*, *Doiron v. Doiron*, 109 N.H. 1, 241 A. 2d 372 (1968).

[3] Cf. *United States v. Gypsum Co.*, 333 U.S. 364, 387 (1948); *Hurn v. Oursler*, 289 U.S. 238, 240 (1933) where the Supreme Court felt compelled to state its view as to the correct law where the lower courts had misstated the law. The Court did this even though the issues did not need to be decided in order to dispose of the case. See also *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350 (1963) where an issue was considered by the Supreme Court even though the contention had been abandoned on

Kalodner, *Circuit Judge*, dissenting.

I dissent from this Order because it inescapably implicitly holds that a defendant's domicile *on the day of the filing of an action* is of dispositive significance in deciding an issue based on conflict of laws.

That implicit holding is utterly without precedent and it is here an exercise in futility.

Moreover, the District Court here made the fact finding that the defendant, Leta Moore, her husband and children were domiciled in Maine on July 15, 1965, when the defendant's husband and children were injured while passengers in an automobile negligently operated by defendant on the Pennsylvania Turnpike. The District Court held that both Maine and Pennsylvania apply the doctrine of interfamilial immunity which precludes suits by one spouse against another and of minor children against a parent, and this doctrine has "absolving effect on third parties." The District Court further held that Pennsylvania, under its conflict rule, would apply the law of the state where the family was domiciled at the time of the accident, viz., Maine. The District Court's finding as to domicile and its holding that Pennsylvania would apply the law of the state of domicile are not challenged on this appeal.

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appeal before the Court. But see *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 444-45 (1959) where the Supreme Court refused to decide a choice of law issue which was unnecessary in order to dispose of the case where the two possibly applicable laws were identical. In the instant case we cannot, on the present record, determine whether the possibly applicable laws are identical until we ascertain these possibly applicable laws. This is the only purpose of our order.

Appendix B

The single critical question presented by the instant appeal is whether the United States, by reason of a state doctrine of interfamilial immunity with respect to tort actions, is barred from recovering from the defendant, pursuant to the provisions of the Medical Care Recovery Act, 42 U.S.C.A. 2651 et seq., the value of medical care furnished to her husband, an Air Force sergeant, and their children, for injuries occasioned by defendant's negligent operation of an automobile in which they were passengers.

The instant Order does not serve the judicial economy, here or in the Court below.

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19,070

United States of America,

Appellant

v.

Leta Moore

Appeal from the United States District Court for the Middle District of Pennsylvania

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Before Biggs and Kalodner, *Circuit Judges*, and Whipple, *District Judge*

(Argued March 18, 1971)

ORDER

And now, this 17th day of June, 1971, it appearing that the domicile of the defendant Leta Moore and the domiciles of the injured members of her family, including her husband, at the time of the filing of the suit and at the date judgment was entered by the District Court against the appellant do not appear from the record, and it further appearing that an issue based on conflict of laws may be present and its disposition may be dependent on the domiciles referred to, it is

Ordered, without determining the relevancy or materiality of facts relating to the domiciles referred to, that this case be and the same hereby is remanded to the United States District Court for the Middle District of Pennsylvania to the end that the parties may stipulate before that court as to the domicile of the defendant Leta Moore and the domiciles of the injured members of her family, including her husband, at the time of the filing of the suit and at the date judgment was entered by the District Court against the appellant, if possible, and if such stipulation cannot be arrived at that the court below shall proceed to take evidence in respect to Leta Moore's domicile and the domiciles of the injured members of her family, including her husband, at the time of the filing of the suit and at the date judgment was entered by the District Court against the appellant, and to determine that issue and to report its determination to this court; and it is

Further ordered that this court will retain jurisdiction of this suit pending the disposition of the issue of the domicile of Leta Moore and the domiciles of the injured members of her family, including her husband, at the time of the filing of the suit and at the date judgment was entered by the District Court against the appellant.

For the Court,

Biggs,

United States Circuit Judge

Judge Kalodner dissents.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 19070

United States of America,

Appellant

v.

Leta Moore

(D. C. Civil Action No. 69-16)

Appeal From the United States District Court for the Middle District of Pennsylvania

Argued March 18, 1971
(Submitted August 16, 1971)
Before Biggs and Kalodner, *Circuit Judges*, and Whipple, *District Judge*

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Appendix C

OPINION OF THE COURT
(Filed April 27, 1972)

Biggs, *Circuit Judge.*

The complaint alleges that jurisdiction rests on 28 U.S.C. §1345 and 42 U.S.C. §2651, *et seq.*, "The Medical Care Recovery Act," set out below in pertinent part.[1] The United States sued Mrs. Leta Moore, whose negligent

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[1] 42 U.S.C. §2651 provides as follows: "Recovery by United States—Conditions; exceptions; persons liable; amount of recovery; subrogation; assignment

"(a) In any case in which the United States is authorized or required by law to furnish hospital, medical, surgical, or dental care and treatment (including prostheses and medical appliances) to a person who is injured or suffers a disease, after the effective date of this Act, under circumstances creating a tort liability upon some third person (other than or in addition to the United States and except employers of seamen treated under the provisions of section 249 of this title) to pay damages therefor, the United States shall have a right to recover from said third person the reasonable value of the care and treatment so furnished or to be furnished and shall, as to this right be subrogated to any right or claim that the injured or diseased person, his guardian, personal representative, estate, dependents, or survivors has against such third person to the extent of the reasonable value of the care and treatment so furnished or to be furnished. The head of the department or agency of the United States furnishing such care or treatment may also require the injured or diseased person, his guardian, personal representative, estate, dependents, or survivors, as appropriate, to assign his claim or cause of action against the third person to the extent of that right or claim.

"Enforcement procedure; intervention; joinder of parties; State or Federal court proceedings

driving caused personel injuries to her husband, a member of the Armed Forces, and their children. The accident occurred in Pennsylvania and at the time of the accident Mrs. Moore and her family were domiciliaries of Maine. At the time of the filing of this suit, Mrs. Moore and her family were domiciled in Nebraska. The United States, as it was obligated to do under the Medical Care Recovery Act, 42 U.S.C. §2651(a), paid the medical expenses of the Moore family and brought the suit at bar to recover from Mrs. Moore the amounts so expended. Mrs. Moore moved for summary judgment pursuant to Rule 56(b) and (c), Fed. R. Civ. Proc., 28 U.S.C. The motion was granted and judgment was entered in favor of Mrs. Moore. The appeal followed.

The trial Judge stated: "Three questions are raised by the defendant in her motion for summary judgment: (1) whether Pennsylvania or Maine law controls; (2) whether the doctrine of interfamiliar [*sic*] immunity pre-

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"(b) The United States may, to enforce such right, (1) intervene or join in any action or proceeding brought by the injured or diseased person, his guardian, personal representative, estate, dependents, or survivors, against the third person who is liable for the injury or disease; or (2) if such action or proceeding is not commenced within six months after the first day in which care and treatment is furnished by the United States in connection with the injury or disease involved, institute and prosecute legal proceedings against the third person who is liable for the injury or disease, in a State or Federal court, either alone (in its own name or in the name of the injured person, his guardian, personal representative, estate, dependents, or survivors) or in conjunction with the injured or diseased person, his guardian, personal representative, estate, dependents, or survivors."

cludes recovery by the United States from a negligent spouse under the Medical Care Recovery Act for the reasonable cost of medical treatment furnished the other spouse and their children, and (3) whether the Medical and Dental Care Act, 10 U.S.C. §§1071-1085, precludes recovery [by the United States] under the Medical Care Recovery Act, *supra.*" (Note omitted.)

The trial Judge applied the intrafamiliar and interspousal immunity laws of Maine, the domicile of the Moore family at the time of the accident, relying upon *Bedell v. Reagan,* 159 Me. 292, 192 A. 2d 24 (1963). See also *Anthony v. Anthony,* 135 Me. 54, 188 A. 724 (1937); *Downs v. Poulin,* Me., 216 A. 2d 29 (1966).[2], [3]

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[2] The District Court stated that the intrafamilial and interspousal immunity laws of Pennsylvania and Maine were the same. The law of Pennsylvania was the same as that of Maine in respect to claims of minor children against a parent and suits brought by one spouse against another except, as specified in 48 P.S. §111, ". . . in a proceeding for divorce, or in a proceeding to protect and recover her [or his] separate property. . . ." Pennsylvania has recently abrogated immunity with respect to claims of minor children against a parent in *Falco v. Pados,* 444 Pa. 372, 282 A. 2d 351 (October 12, 1971), but the liability of a wife toward her husband or a husband toward his wife was not altered by the Supreme Court of Pennsylvania because of the Pennsylvania statute of June 8, 1893, P. L. 344, §3, as amended by the Act of March 27, 1913, P. L. 14, §1, 48 P.S. §111. Mr. Justice Eagen stated, 282 A. 2d at 357: "in our view, the above statutory enactment prevents the plaintiff, Edward Falco, from recovering damages from his wife in the personal injury action involved, even though his rights are derivative, and even though payment of the damages awarded him will come from her liability insurance carrier via attachment execution proceedings." Cf. *Daley v. Buterbaugh,* 416 Pa. 523, 207 A. 2d 412 (1964).

Appendix C

The suit at bar is not one bottomed on diversity but is based, as we have said, on two federal statutes, 28 U.S.C. §1345 and 42 U.S.C. §2651. The accident took place in Pennsylvania. The domiciles of Mrs. Moore and her family, as we have stated, have been Maine and Nebraska. The laws of the States in respect to intrafamilial and interspousal immunity have been created on the theory that the bringing of a suit by one member of a family against another member may lead to family strife or at least to the loss of domestic tranquility. Therefore the laws of the State, here Nebraska, in which the family resided at the time of the bringing of the suit might well apply. One might also plausibly argue that the law of the State of the domicile of the family at the time of the accident, when all rights may be said to have arisen, should govern. We think it is correct to say that the State in which the accident occurred, in this instance Pennsylvania, is the State lease involved in familiar matters.[4] On balance, we deem

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The parties have stipulated that the domicile of the Moore family at the time of the filing of the instant case was Nebraska. The laws of Nebraska and Maine are similar in substance.

The District Judge found that Mrs. Moore was guilty of negligence. This finding has not been questioned.

We point out that insofar as the record shows Mrs. Moore has not been sued by any member of her family as the result of her negligence.

[3] The trial Judge referred in his opinion to the Medical and Dental Care Act, 10 U.S.C. §§1071-1085, but stated: "I perceive no substantial conflict between the Medical and Dental Care Act and the Medical Care Recovery Act. . . ." We agree with the District Judge on this point and conclude this matter need not be pursued further.

[4] The liability for doctors' fees and hospital bills might well be governed by the law of the place of the accident, *i.e.*, Pennsyl-

the law of Maine to be that which should be applied for the rights of the parties would become fixed at the time of the accident. We conclude for the reasons set out hereinafter that State law governs.

What then is the law of Maine? Relying on *Bedell v. Reagan,* we conclude that the doctrines of parental and interspousal immunity prevent Mr. Moore or the Moore children from maintaining a suit against Mrs. Moore. While the *Bedell* case applies only to reciprocal spouses and does not deal with the rights of children to sue their parents, the law of Maine prohibits such suits. *Downs v. Poulin, supra.* In *Bedell,* the husband, Ormand Bedell, owned and operated an automobile in which his wife, Patricia, was a passenger. The Bedells' automobile collided with a car driven by Reagan. The Bedells filed a "two-fold complaint," employing Rule 14(a), Maine Rules of Civil Procedure, 155 Me. 504, for damages against Reagan who answered on the merits denying liability. Reagan, as a third-party plaintiff, sued Ormand Bedell as a third-party defendant. The trial court dismissed the third-party complaint under the doctrine of legal disability between reciprocal spouses. The Supreme Court of Maine reinstated Reagan's complaint holding that the doctrine of legal disability between the reciprocal spouses, Ormand and Patricia, could not be employed as a defense in a joinder proceeding with cross complaint by the singly sued defendant, Reagan, against the third-party defendant, Ormand Bedell, whose conduct may have contributed to the accident. The Court stated: "The rationale of the disability of reciprocal spouses as litigants against each other

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vania, but we cannot deem this to be a compelling reason to disregard all other facets of the case.

is the legal unification of husband and wife and the preservation of domestic peace and felicity. Should, however, a passenger wife injured by the participating or joint negligence of her driver husband and of a third party be permitted to recover the entire amount of her damages from the third party who is denied his equitable right to contribution from her husband solely because of the husband's marital status, then such third party would be unjustly required not only to compensate for his own fault but also to pay the pecuniary equivalent of the husband's wrong. The third party would be penalized because of the marital fact which to him can only constitute an accidental [circumstance] under such circumstances. The mystical concept of personal, wedded unity and the paternalistic apprehension of domestic discord between the spouses can not be so compelling as to vindicate such an incongruity." 192 A. 2d at 26.

It will be noted that the Court's decision turned on the possible tort of the third-party defendant.[5] In the case at bar, however, there is no tort liability on the part of the United States and what is the most potent reason for not allowing recovery by the United States against Mrs. Moore is the terms of the statute itself. 42 U.S.C. §2651(a) provides: "In any case in which the United States is authorized or required by law to furnish hospital, medical, surgical, or dental care and treatment . . . to a person who is injured or suffers a disease, after the effective date of this Act, *under circumstances creating a tort liability upon some third person* (other than or in addition to the United States . . .) to pay damages therefor, the United States

[5] See 47 Harv. L. Rev. 209, 241 (1933); Harper & James, The Law of Torts, §10.2, at 718 (1956); 19 ALR 2d 1003.

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shall have a right to recover from said third person the reasonable value of the care and treatment so furnished or to be furnished and shall, as to this right be subrogated to any right or claim that the injured or diseased person . . . has against such third person. . . ." (Emphasis added.) In view of the foregoing it is not possible to put the United States into a recoverable position. The United States was not a tortfeasor; it has committed no tort. It simply has a right given it by federal statute to recover against a tortfeasor where there is no bar to such an action under applicable State law,[6] if indeed State law moulds the remedy.

The United States takes the position, relying, *inter alia*, upon *United States v. Merrigan*, 389 F. 2d 21 (3 Cir. 1968), *United States v. Gera*, 409 F. 2d 117 (3 Cir. 1969), and *United States v. Housing Authority of the City of Bremerton*, 415 F. 2d 239 (9 Cir. 1969), that §2651(a) of the Medical Care Recovery Act grants the United States an independent right to recover and does not subrogate that right to whatever rights the injured person may have had against the offending third person.

A brief recital of the legislative history is pertinent but throws no great light on the problem presented here. Following the decision in *United States v. Standard Oil Company*, 332 U.S. 301 (1947), §2651 was enacted. In the *Standard Oil* case the Supreme Court denied recovery to the United States for sums which it had expended for

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[6] The law of Nebraska also will prevent recovery by the United States. See *Pullen v. Novak*, 169 Neb. 211, 99 N.W. 2d 16 (1959); *Emerson v. Western Seed & Irrigation Co.*, 116 Neb. 180, 216 N.W. 297 (1927); *Melburn v. Walker*, 279 F. Supp. 740 (D. Neb. 1968).

the medical care of a soldier injured by the negligence of Standard. Recovery had been sought below on the theory of master and servant relationship alleged to be existing between the United States and a member of the Armed Forces. The District Court granted relief, 60 F. Supp. 807, but the Court of Appeals reversed, 153 F. 2d 958. The Supreme Court concluded that if the United States was to be allowed recovery under such circumstances jurisdiction to entertain such a suit should be created by Congress and not by the Supreme Court.[7] Consequently §2651 was enacted. See the statute's legislative history, *viz.*, "Hospital Care—Third Party Liability, Senate Report No. 1945, Section Analysis, Section 1 (a);" United States Code, Congressional and Administrative News, Volume 2, 87th Congress, Second Session 1962, 2637 at 2640, *et seq.* It will be noted that the House amended the Senate bill to provide a right for an original action by the United States. See *United States v. York,* 398 F. 2d 582 (6 Cir. 1968), and note 3 cited to the text at 584. That there is an independent right of action seems now to be agreed to by most authorities. See the decisions set out in *York,* footnote 2 at 584.

As we have stated, note 1, *supra,* the statute provides: "In any case in which the United States is . . . required by law to furnish hospital, medical, surgical . . . care and treatment . . . to a person who is injured . . . under circumstances *creating a tort liability upon a third person* . . . to pay damages therefor, the United States shall have

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[7] Mr. Justice Rutledge stated, 332 U.S. at 302: "Not often, since the decision in *Erie R. Co. v. Tompkins,* 304 U.S. 64, is this Court asked to create a new substantive legal liability without legislative aid and as at the common law. This case of first impression here seeks such a result."

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a right to recover from said person the reasonable value of the care and treatment so furnished . . . and shall, as to this right *be subrogated*[8] to any right or claim that the injured person . . . has against such third person. . . . The head of the department or agency of the United States furnishing such care or treatment may also require the

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[8] A difficulty in interpretation at once appears for as is pointed out in *United States v. Greene*, 266 F. Supp. 976, 979 (N.D. Ill. 1967), "a tort victim can only recover expenses which he has or will become liable to pay as a result of tortious conduct." Since Mrs. Moore's husband and family were not liable to the government for the treatment they received as a result of Mrs. Moore's tortious conduct they could not recover the reasonable value of the treatment from the alleged tort-feasor. In short, there is no "subrogation" as that phrase is customarily used.

In *Greene*, Judge Will based his decision on two grounds: first, on the definition of the word "subrogation", finding subrogation to be a derivative right, and holding that the right granted by §2651 to the United States was not a derivative but an independent right: and second, since the United States was given a new substantive right by §2651 it was not subject to any definition which a subrogation might find fatal. Judge Will employed the definition of subrogation set out in 40 *Words and Phrases*, at 656 ff, "Subrogation", see note 6 cited to the text at 979.

Judge Will made an exception to the foregoing statement for he said, 266 F. Supp. at 978, that the "separate federal right" created by §2651 is not subject to procedural or contractual infirmities which might bar the action by the tort victim. He pointed out, however, that the United States' recovery may be barred by substantive defenses such as contributory negligence or lack of negligence. In *Greene* the issue presented was whether or not a release given by the victim of the accident, O'Guin, to the tort-feasor had released the cause of action of the United States. It was also asserted that the statute of limitation of Illinois had run and that the cause of action had expired with it. Judge Will held that procedural defenses did not bar recovery.

injured or diseased person, his guardian, personal representative, estate, dependents, or survivors, as appropriate, to assign his claim or cause of action against the third person to the extent of that right or claim." (Emphasis added.) The courts, however, which have decided the scope of §2651 have agreed to construe the statute in such a way as to effect what was the palpable intention of Congress and this course is expressed by Judge Celebrezze in *York, supra,* at 584 as follows: "All of the courts that have applied the Act are agreed, however, that the right of the United States is an independent right, subrogated only in the sense that the person sued by the Government must be liable to the injured person in tort. For example, the United States' right to recover for medical expenses is not barred by a state statute of limitations that would bar an action by the injured person. . . . Nor can the Government's recovery be denied because the injured person has given a release to the tortfeasor. . . . Moreover, the legislative history of the Act makes it clear that Congress intended to give the United States an independent right." (Footnotes and citations omitted.)

Albeit the United States is given a right to bring an independent suit by §2651, *York's* principle subrogates the claim of the United States to State tort law and, therefore, if it constitutes a correct interpretation of the Act, immunity provisions, varying from State to State,[9] would

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In this connection see *United States v. Haynes,* 445 F. 2d 907, 909 (5 Cir. 1971), *infra,* and also *United States v. Fort Benning Rifle and Pistol Club,* 387 F. 2d 884, 887 (5 Cir. 1967), *infra.*

[9] As to the very numerous interpretations of the doctrines, varying from State to State, see *Interspousal Immunity,* 21 Rutgers L. Rev. 491 (1967), and *Negligence-Parent-Child, Case Comments,* 44 Notre Dame L. Rev. 1001 (1969).

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deprive the United States in many instances of reimbursement unless some valid distinction to the stated principle could be found. On the other hand, if Congress gave a right to the United States to sue for reimbursement based solely on federal law, the United States can gain reimbursement uniformly and universally throughout the United States and be not dependent upon the vagaries of State immunity provisions. The right to fashion a governing rule of law by federal courts has been recognized by the Supreme Court but we cannot conclude that it was the intention of Congress to authorize such action in respect to §2651.[10], [11]

The interpretation of §2651 is a difficult task, As we read it, particular emphasis should be laid upon the fact that the right of the United States to recover under the Act is subject to the provision of "circumstances creating a tort liability upon some third person." Obviously, the liability of a "third person" must be determined by local tort law, *i.e.*, the tort law of some State.[12] This conclusion,

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[10] See *Friendly, In Praise of Erie*, 39 N.Y.U.L. Rev. 382, 410, *et seq.* (1964); *Hill, Constitutional Preemption*, 67 Col. L. Rev. 1024 (1967). See also *Bernzweig, An Analysis and Interpretation of the Federal Medical Care Recovery Act*, 64 Col. L Rev. 1257, subhead "C". *Federal Law and the United States' Claim for Reimbursement*, 1263, *et seq.* (1964).

[11] In *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943), Mr. Justice Douglas stated: "In the absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to its own standards."

[12] See *Bernzweig, supra*, note 7, at 1263. Bernzweig takes the position that the occurrence of an injury creating a tort liability upon a third person is a "condition precedent" to recovery by the United States. The phrase seems an apt one.

however, leaves us with further difficult issues. What about local statutes of limitations? In *United States v. Gera, supra,* at 120, this court by Kalodner, J., quoted with approval *United States v. Fort Benning Rifle and Pistol Club,* 387 F. 2d 884, 887 (5 Cir. 1967), as follows: "We . . . hold that the right of the United States to recover the reasonable value of medical care given to an injured person as the result of the negligence of a third person is not subject to the state statutes of limitation applicable to local personal injury actions. Limitations has nothing to do with whether the circumstances surrounding the injury create a tort liability in that third person." To this, this court added the note "8", stating: "In United States v. York, 398 F. 2d 582, 584 (6 Cir. 1968), the Court cited *Fort Benning* in support of its statement that: '. . . the United States' right to recover for medical expenses is not barred by a state statute of limitations that would bar an action by the injured person.' "

The most recent decision on this subject is *United States v. Haynes,* 445 F. 2d 907 (5 Cir. June 1, 1971). The following appears from the opinion of Judge Clark in this case: "The facts are not disputed. On September 21, 1966, in Irwin, Louisiana, Mrs. Vida Haynes was a passenger in a car owned and operated by her serviceman-husband, Joseph Haynes. Mr. Haynes' negligent driving caused an accident which resulted in severe bodily injuries to his wife. Since Mrs. Haynes was a military dependent, the United States was required to, and did, provide medical care and treatment, the reasonable value of which amounted to $1,025.25. At the time the accident occurred, Mr. Haynes was insured by the Allstate Insurance Company, which provided him with liability coverage.

Appendix C

"The United States instituted this action under the Medical Care Expense Recovery Act, 42 U.S.C.A. §2651 *et seq.* (1970) [*sic*] (hereinafter Act) in the United States District Court for the Eastern District of Louisiana, against Mr. Haynes and Allstate, to recover the value of the medical care given to Mrs. Haynes. The district judge granted the joint motion of Mr. Haynes and Allstate to dismiss on the ground that they were free from liability because, under the peculiarities of Louisiana law, Mrs. Haynes' tort claim for medical care expense (unlike her claim for personal injuries) is a community claim which must be brought by the husband as master of the community, and that a suit by the husband against himself would be barred. In this resulting appeal, we are called on to determine whether the trial court erred in concluding that under Louisiana law a tort-feasor husband and his insurer can defeat the right of the United States to bring an action against them under the Act by raising a personal defense of the husband derived from that State's community property law." (Footnotes omitted.) *Id.* at 908. Louisiana has a statute which permits a direct action against an insurance company. LSA-R.S. 22:655 (1971 Supp.). The Court of Appeals for the Fifth Circuit reversed this decision, stating that the basic purpose of the Act was to allow the Government to recover from third-party wrong-doers medical expenses "under circumstances creating tort liability" upon third persons. Judge Clark sets out the proposition that the right of the United States to recover "is subject only to those substantive state doctrines which create or negate such liability."

"The issue thus reduces itself to the following: Is a wife who is injured by her husband, a person injured 'un-

der circumstances creating tort liability' upon the husband? This question must be answered in the affirmative." *Id.* at 909.

The essence of the ruling of the Fifth Circuit Court of Appeals, as we perceive it, is that Louisiana's "procedural proviso" that a medical claim of a wife belongs to her husband and therefore he cannot recover against himself because of his own negligence, does not obliterate the right of the United States to recover against the husband because he was a "third person" against whom there had been *created* a tort liability. The Court took the position that the husband's negligence *created* a tort liability and though there was a "procedural proviso" or procedural device which would prevent him from recovering for his wife's injuries under Louisiana law, such a "procedural proviso" or procedural device, such as a statute of limitations, could not prevail against the United States in a suit brought by the Government under §2651; in other words, creation of liability is to be viewed as a separate, distinct and different thing from a "procedural proviso" or procedural device, such as a statute of limitations or contributory negligence by which liability under §2651 might be avoided. To put this concept somewhat differently, once the liability is created by the negligent act it runs in favor of the United States and against the third person and cannot be avoided by him.

We think too much emphasis can be placed on procedural as distinguished from substantive law and that we come close to metaphysical inutile concepts when an attempt is made under circumstances such as those at bar to distinguish between substantive law and procedural law.

Appendix C

To repeat what we have attempted to state at an earlier point in this opinion, whatever may be the application of §2651 under Louisiana law, and concerning this we express no opinion, we conclude that in the instant case the preferable test lies in the language of the statute itself, in particular in the phrase "circumstances creating a tort liability upon a third person." We think we cannot avoid construing this as a reference to the tort law of a State or Territory. Congress was not looking toward some federal tort but to local laws of torts, and it would seem to us to be a highly metaphysical argument to contend that intrafamilial or interspousal immunities, while they may be part of the familiar law of a State, such as Maine, are not under the circumstances at bar completely applicable to Maine tort law. It follows, we think, that the creation of liability under Maine tort law cannot be considered apart from the Maine doctrines of immunity, thus permitting the United States to recover. We think that we must take the Maine law as a whole and conclude not only that no liability can be imposed upon Mrs. Moore but that the United States cannot recover.

Our view in this connection we believe to be buttressed by the assignment provisions of §2651. See, for example, the letter of then Deputy Attorney General (now Mr. Justice) Byron R. White addressed to Congressman Celler, Chairman of the Committee on the Judiciary of the House of Representatives, dated August 1, 1961.[13] We think it is difficult to treat the assignment provisions of

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[13] See "Hospital Care—Third Party Liability, Senate Report No. 1945, Section Analysis, Conclusion," United States Code and Administrative News, Volume 2, 87th Congress Second Session, 1962, at 2643-2644. See, *supra*, this opinion.

§2651 other than as congruent to the "subrogation" provisions and we think it would not be contended that if an assignment of the rights of an injured person against a "third person" were made to the United States, the United States would not take that assignment *cum onere* and that any defense that could have been asserted by the "third person" against any plaintiff could not also be asserted against the United States.

In conclusion, as a final point, as we have said, the United States Attorney's brief and argument relies on *United States v. Housing Authority of the City of Bremerton, supra,* but that decision is not apposite. In the cited case the Housing Authority was negligent and any possible contributory negligence of the parents of the injured child was irrelevant to that liability under Washington state law. We cannot say in the case at bar that the immunity provisions of Maine law do not obviate the liability of the "third person", Mrs. Moore. By reason of the immunity laws of Maine she has no tort liability. Therefore, the contentions of the United States must fall.

The judgment will be affirmed.

Kalodner, *Circuit Judge,* dissenting.

In the instant action, the United States, pursuant to the provisions of the Medical Care Recovery Act, seeks to recover from the defendant Leta Moore expenses incurred when it was obligated to provide medical care for her husband, a member of the armed forces, and their three children, for injuries caused by her undisputed negligent driving.

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Appendix C

The District Court granted summary judgment against the United States based on its conclusion "that no tort liability exists on the part of Leta Moore arising from this accident," because Maine does not permit actions for negligent tort by one spouse against the other, or by a minor child against a parent.

The majority subscribes to the District Court's ruling. The sum of its holding is that the Maine family immunity laws *purge* a spouse and parent tortfeasor of any and all liability for negligent tort, and, consequently, the United States cannot maintain its action under the Medical Care Recovery Act because there exists "no circumstances creating a tort liability on some third person," as provided by the Act.

In so holding the majority says at page 10 of its Slip Opinion:

> ". . . As we read it, particular emphasis should be laid upon the fact that the right of the United States to recover under the Act is subject to the provision of 'circumstances creating a tort liability upon some third person.' Obviously, the liability of a 'third person' must be determined by local tort law, *i.e.*, the tort law of some State." (Footnote omitted.)

Implicit in the majority's stated view is a *sub silentio* holding that enforcement of the Medical Care Recovery Act is subject to the vagaries of state family immunity laws.

I dissent from that holding. I am of the opinion that the Medical Care Recovery Act confers on the United States an independent right of recovery which is unim-

paired by the vagaries of state family immunity laws; otherwise stated, enforcement of the Act is free of the impact of right-to-sue limitations imposed by a state's family immunity laws.

I dissent too, from the majority's view that the Maine family immunity laws *purge* a spouse or parent tortfeasor of any and all tort liability. I do so because the Supreme Judicial Court of Maine has expressly held that Maine's interspousal immunity law does no more than impose a "legal disability" on one spouse to sue another for negligent tort, and that such disability does not operate to *"inflict injustice upon outsiders and deprive them of their legal rights." Bedell v. Reagan*, 159 Me. 292, 192 A. 2d 24 (1963). (Emphasis supplied.)[1]

Since the prime question presented is whether enforcement of the Medical Care Recovery Act is subject to the vagaries of state family immunity laws and their right-to-sue limitations it will be accorded priority of discussion.

Relevant to its resolution is the recent holding of the Fifth Circuit in *United States v. Haynes*, 445 F. 2d 907 (1971), that enforcement of the Act is not subject to the right-to-sue provisions of Louisiana's community property law.

In *Haynes*, the wife of a soldier was injured by his negligence. The Government provided her with medical care as a military dependent and then sued the husband

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[1] In *Bedell*, only the Maine interspousal immunity law was involved. In Downs v. Poulin, 216 A. 2d 29 (Me. 1966), it was held that Maine's parental immunity law is analogous to its interspousal immunity law.

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and his insurance company[2] for the reasonable value of the care under the Medical Care Recovery Act. The District Court dismissed the Government's action on the ground that the defendants were free of liability because, under Louisiana's community property law the claim of an injured wife for medical expenses is a community claim which must be brought by the husband as master of the community, and that a suit by the husband against himself would be barred.

The Fifth Circuit reversed on the grounds that the Government's right of recovery under the Medical Care Recovery Act is an independent right free of "the vagaries of state law"; "[t]he government's right is independent and is not limited by procedural bars to which others—including Mrs. Haynes herself—might be subject"; "[m]oreover, the marital relations policy behind this state procedure is inapplicable to the federal government"; and "[t]he essential element—'circumstances creating tort liability'—is present." 445 F. 2d 910.

The Fifth Circuit further noted that in *United States v. Standard Oil Company of California,* 332 U.S. 301 (1947), (which led to the enactment of the Medical Care Recovery Act because of its holding that then existing federal laws did not confer a right of recovery for medical care extended to a soldier and that it was up to Congress to enact such a law), it was pointed out that the Government's right of indemnification for medical care (if enacted) should "*not vary in accordance with the different rulings of the several states, simply because the soldier*

[2] Louisiana law permits joinder of a defendant's insurance company as a defendant.

*marches or, * * * flies across state lines."* 445 F. 2d 910. (Emphasis supplied.)

In *United States v. Merrigan,* 389 F. 2d 21, 23-24 (1968), we held that the Medical Care Recovery Act "unmistakably confers on the Government what the congressional reports describe as an *'independent right of recovery,'* " and, that the Act's "remedial or procedural" provisions *"are not to be construed strictly against the government, but rather in aid of the substantial right which the statute has created."* (Emphasis supplied.) In support of the latter holding we cited *Wyandotte Transportation Co. v. United States,* 389 U.S. 191 (1967), where it was held that when a specific interest and right has been conferred upon the United States by statute, the remedies and procedures for enforcing that right are not to be narrowly construed so as to prevent the effectuation of the policy declared by Congress.

Significantly relevant here is our holding in *United States v. Gera,* 409 F. 2d 117, 120 (1969), that "the Government's exercise of its independent right under the Medical Care Recovery Act *is free of the restraints imposed by a state statute of limitations."* (Emphasis supplied.) It cannot reasonably be contended that a disability to sue by reason of a statute of limitations is different than a disability to sue imposed on a spouse or minor child under a state's family immunity laws.

Other circuits are in accord with *Merrigan* and *Gera.*

Merrigan was cited and followed in *United States v. Housing Authority of the City of Bremerton,* 415 F. 2d 239 (9 Cir. 1969). It was there held that the United States could maintain an action against the Housing Authority under the Medical Care Recovery Act, for medical

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care extended to an infant child of a serviceman, despite the circumstance that the child's parents could not sue the Housing Authority for its medical expenses by reason of their contributory negligence.

In so holding the Court said at page 241:

> "All courts which have considered the question have agreed that the statute gives the United States an independent right of recovery against the tortfeasor; *the United States is not merely subrogated to the injured party's claim.*" (Emphasis supplied.)

In *United States v. Fort Benning Rifle and Pistol Club,* 387 F. 2d 884 (5 Cir. 1967), the Court held, as we did in *Gera,* that the Medical Care Recovery Act is not subject to the bar of a state statute of limitations which would have precluded the injured party, to whom medical care was extended, from bringing an action.

In so holding the Court said (p. 887):

> "We . . . hold that the right of the United States to recover the reasonable value of medical care given to an injured person as a result of the negligence of a third person is not subject to the state statutes of limitations applicable to local personal injury actions. *Limitations has nothing to do with whether the circumstances surrounding the injury create a tort liability in that third person.*" (Emphasis supplied.)

The Achilles heel of the majority's position is its critical implicit holding that enforcement of the Medical Care Recovery Act is subject to the vagaries of state family immunity laws. That holding eclipses its earlier discussed erroneous concepts that (1) right-to-sue limitations of family immunity laws operate to purge a spouse or parent

tortfeasor of all tort liability; and (2) the right of recovery accruing to the Government under the Act is nothing more than a right of subrogation.

The holding that enforcement of the Act is subject to the vagaries of state family immunity laws is grevious error, in utter disregard of the Congressional intent in enacting the Medical Care Recovery Act. Subjection of enforcement of the Act to vagaries of state laws would make a shambles of the Act. As matters now stand, nine of the fifty states in the Union have abolished all family immunity laws, interspousal and parental; seven of the fifty have abolished interspousal immunity only, and four of the fifty have abolished parental immunity. Most of these abandoments of immunity have occurred since enactment of the Medical Care Recovery Act in 1962; a number of them as recently as the past two years.[3]

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[3] STATES WHICH HAVE ABOLISHED ALL INTRA-FAMILY IMMUNITY:

ALASKA: Cramer v. Cramer, 379 P. 2d 95 (Alas. 1963) (Interspousal); Hebel v. Hebel, 435 P. 2d 8 (Alas. 1967) (Parent-child).

CALIFORNIA: Klein v. Klein, 58 Cal. 2d 692, 26 Cal. Rptr. 102, 376 P. 2d 70 (1962) (Interspousal); Gibson v. Gibson, 3 Cal. 3d 914, 92 Cal. Rptr. 288, 479 P. 2d 648 (1971) (Parent-child).

KENTUCKY: Layne v. Layne, 433 S.W. 2d 116 (Ky. 1968) (Interspousal); Rigdon v. Rigdon, 465 S.W. 2d 921 (Ky. 1970) (Parent-child).

MINNESOTA: Balts v. Balts, 273 Min. 149, 142 N.W. 2d 66 (1966) (Parent-child); Beaudette v. Frana, 285 Minn. 366, 173 N.W. 2d 416 (1969) (Interspousal).

NEW HAMPSHIRE: Morin v. Letourneau, 102 N.H. 309, 156 A. 2d 131 (1959) (Interspousal); Briere v. Briere, 107 N.H. 432, 224 A. 2d 588 (1966) (Parent-child).

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Appendix C

The vice of the majority's position that the Medical Care Recovery Act is subject to the vagaries of state family immunity laws disregards these simple elementary facts, namely:

NEW JERSEY, France v. A.P.A. Transport Co., 56 N.J. 500, 267 A. 2d 490 (1970) (Parent-child); Immer v. Risko, 56 N.J. 482, 267 A. 2d 481 (1970) (Interspousal).

NEW YORK: Weicker v. Weicker, 28 App. Div. 2d 138, 283 N.Y.S. 2d 385 (1967) (Interspousal); Gelbman v. Gelbman, 23 N.Y. 2d 439, 297 N.Y.S. 2d 578, 245 N.E. 2d 192 (1969) (Parent-child).

NORTH DAKOTA: Fitzmaurice v. Fitzmaurice, 62 N.D. 191, 242 N.W. 526 (1932) (Interspousal); Nuelle v. Wells, 154 N.W. 2d 364 (N.D. 1967) (Parent-child).

WISCONSIN: Bodenhagen v. Farmers Mutual Ins. Co., 5 Wis. 2d 306, 95 N.W. 2d 822 (1959) (Interspousal); Golles v. White, 20 Wis. 2d 402, 122 N.W. 2d 193 (1963) (Parent-child).

STATES WHICH HAVE ABOLISHED PARENT-CHILD IMMUNITY ONLY:

ARIZONA: Streenz v. Streenz, 106 Ariz. 86, 471 P. 2d 282 (1970).

HAWAII: Peterson v. City & County of Honolulu, 51 Hawaii 84, 462 P. 2d 1007 (1970).

ILLINOIS: Schenk v. Schenk, 100 Ill. App. 2d 199, 241 N.E. 2d 12 (1968).

PENNSYLVANIA: Falco v. Pados, 444 Pa. 372 (1971).

STATES WHICH HAVE ABOLISHED INTERSPOUSAL IMMUNITY ONLY:

ALABAMA: Penton v. Penton, 223 Ala. 282, 135 So. 481 (1931).

ARKANSAS: Leach v. Leach, 227 Ark. 599, 300 S.W. 2d 15 (1957).

COLORADO: Rains v. Rains, 97 Colo. 19, 46 P. 2d 740 (1935).

CONNECTICUT: Silverman v. Silverman, 145 Conn. 663, 145 A. 2d 826 (1958).

LOUISIANA: United States v. Haynes, 445 F. 2d 907 (5 Cir. 1971).

Appendix C

The Act is a federal law which creates an independent substantive federal right, enacted by Congress pursuant to its constitutional powers in matters of military affairs and federal fiscal policy.

In ruling that "the scope, nature, legal incidents and *consequences* of the relations between persons in service and the Government *are fundamentally derived from federal sources and governed by federal authority,*" the Court, in *United States v. Standard Oil of California,* said:

> "Perhaps no relation between the Government and a citizen is more distinctively federal in character than that between it and members of its armed forces. To whatever extent state law may apply to govern the relations between soldiers or others in the armed forces and persons outside them or nonfederal governmental agencies, *the scope, nature, legal incidents and consequences of the relation between persons in service and the Government are fundamentally derived from federal sources and governed by federal authority.* See *Tarble's Case,* 13 Wall. 397; *Kurtz v. Moffitt,* 115 U.S. 487. *So also we think are interferences with that relationship such as the facts of this case involve. For, as the Federal Government has the exclusive power to establish and define the relationship by virtue of its military and other powers, equally clearly it has power in execution of the same functions to protect the relation once formed from harms inflicted by others.*

NORTH CAROLINA: Bogen v. Bogen, 219 N.C. 51, 12 S.E. 2d 568 (1963).

SOUTH CAROLINA: Fowler v. Fowler, 242 S.C. 252, 130 S.E. 2d 568 (1963).

"Since also the Government's purse is affected, as well as its power to protect the relationship, its fiscal powers, to the extent that they are available to protect it against financial injury, add their weight to the military basis for excluding state intrusion. Indeed, in this aspect the case is not greatly different from the *Clearfield* [*Clearfield Trust Co. v. United States,* 318 U.S. 363 (1943)] case or from one involving the Government's paramount power of control over its own property, both to prevent its unauthorized use or destruction and to secure indemnity for those injuries." 332 U.S. 305-306 (footnotes omitted) (emphasis supplied).

In its further ruling that a claim by the United States for recovery of its medical care expense, arising by reason of a wrongdoer's conduct, should not be subjected to the vagaries of state law, the Court said:

"Whether or not, therefore, state law is to control in such a case as this is not at all a matter to be decided by application of the *Erie* [*Erie R.R. Co. v. Thompkins,* 304 U.S. 64 (1938)] rule. For, except where the Government has simply substituted itself for others as successor to rights governed by state law, the question is one of federal policy, affecting not merely the federal judicial establishment and the groundings of its action, but also the Government's legal interests and relations, a factor not controlling in the types of cases producing and governed by the *Erie* ruling. And the answer to be given necessarily is dependent upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state

law. These include not only considerations of federal supremacy in the performance of federal functions, but of the need for uniformity and, in some instances, inferences properly to be drawn from the fact that Congress, though cognizant of the particular problem, has taken no action to change long-settled ways of handling it.

"Leaving out of account, therefore, any supposed effect of the *Erie* decision, we nevertheless are of opinion that state law should not be selected as the federal rule for governing the matter in issue. Not only is the government-soldier relation distinctively and exclusively a creation of federal law, but we know of no good reason why the Government's right to be indemnified in these circumstances, or the lack of such a right, should vary in accordance with the different rulings of the several states, simply because the soldier marches or today perhaps as often flies across state lines." 332 U.S. 309-310.

Coming now to the majority's holding, at page 14 of its Slip Opinion, that "[b]y reason of the immunity laws of Maine she [the defendant] has no tort liability."

The majority premises its holding on its construction of *Bedell v. Reagan, supra.* The long and short of it is that the majority has misconstrued the *Bedell* decision to hold that Maine's interspousal immunity law purges a spouse tortfeasor of *any and all* tort liability *towards all and sundry.*

Bedell did *not* hold that the Maine immunity law purges a tortfeasor of all liability towards all and sundry. It specifically held that (1) the Maine law does no more than impose a "legal disability" on one spouse to sue the

other for negligent tort; and (2) a third party could pursue legal rights of recovery against a joint tortfeasor although the tortfeasor's wife could not sue him by reason of her "legal disability" to do so.

In making the latter stated holding the Court said in *Bedell:*

> " 'The legal unity of husband and wife and the preservation of domestic peace and felicity between them are desirable things to maintain where they do not produce injustice to the wife and *where they do not inflict injustice upon outsiders and deprive them of their legal rights.' Fisher v. Diehl,* 156 Pa. Super. 476, 40 A. 2d 912, 917. *See, also Kiser v. Schlosser,* 389 Pa. 131, 132 A. 2d 344, 346." 192 A. 2d 26-27. (Emphasis supplied.)

The majority, regrettably, has overlooked the foregoing holding in *Bedell,* and failed to include it in quoting from the Court's opinion in that case.

Under *Bedell,* the Maine family immunity laws do not operate to "inflict injustice upon outsiders and deprive them of their legal rights." Here, the United States is an "outsider" possessed of "legal rights" conferred by the Medical Care Recovery Act, and *Bedell* accordingly would not bar the instant action.

For the reasons stated I would reverse the Order of the District Court granting the defendant's motion for summary judgment against the United States.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19,070

United States of America,

Appellant

vs.

Leta Moore

(D. C. Civil Action No. 69-16)

On appeal from the United States District Court for the Middle District of Pennsylvania.

Present: Biggs and Kalodner, Circuit Judges and Whipple, District Judge.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was originally argued by counsel and later submitted.

On consideration whereof, it is now ordered and adjudged by this Court that the judgment of the said District Court, filed March 27, 1970, be, and the same is hereby affirmed, with costs taxed against appellant.

Attest:
Thomas P. [illegible]
Clerk

April 27, 1972

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19,070

United States of America,

Appellant

v.

Leta Moore

ORDER

Present: Biggs and Kalodner, Circuit Judges, and Whipple, District Judge

AND NOW, to wit, this 22nd day of June, 1972, it is

ORDERED that the opinions, both majority and dissenting, filed herein on April 27, 1972, be, and the same are hereby withdrawn; and it is

FURTHER ORDERED that rehearing be had in this case and it should be submitted to the instant panel without oral argument in accordance with Third Circuit Rule 12(6) on July 24, 1972; it is

FURTHER ORDERED that should the parties desire to do so, they may file supplemental briefs in typewritten form; the appellant within 10 days of this Order, and the appellee within 10 days thereafter.

By the Court:

Biggs,

United States Circuit Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19,070

United States of America,

Appellant

v.

Leta Moore

(D. C. Civil Action No. 69-16)

Appeal From the United States District Court
For the Middle District of Pennsylvania

Argued March 18, 1971
(Submitted August 16, 1971)
(Resubmitted under Third Circuit Rule 12(6)
on July 24, 1972)

Before Biggs and Kalodner, *Circuit Judges,* and
Whipple, *District Judge*

Appendix E

OPINION OF THE COURT
(Filed October 19, 1972)

Kalodner, *Circuit Judge.*

The prime question presented by this appeal is whether enforcement of the federal Medical Care Recovery Act[1] ("Act") is subject to the vagaries of state family immunity laws and their right-to-sue limitations.

The District Court answered the question in the affirmative in the instant action by the United States, pursuant to the provisions of the Act, to recover from the defendant Leta Moore expenses incurred when it was obliged to provide medical care for her husband, a member of the armed forces, and their three children, for injuries caused by her undisputed negligent driving.

The District Court granted summary judgment against the United States based on its conclusion "that no tort

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[1] The Medical Care Recovery Act provides in relevant part: 42 U.S.C. §2651(a):

"In any case in which the United States is authorized or required by law to furnish hospital, medical, surgical, or dental care and treatment * * * to a person who is injured or suffers a disease * * * under circumstances creating a tort liability upon some third person (other than or in addition to the United States * * *) to pay damages therefor, the United States shall have a right to recover from said third person the reasonable value of the care and treatment so furnished or to be furnished and shall, as to this right be subrogated to any right or claim that the injured or diseased person * * * has against such third person to the extent of the reasonable value of the care and treatment so furnished or to be furnished. * * *"

liability exists on the part of Leta Moore arising from this accident," because, in its view, Maine Law, applicable here, does not permit actions for negligent tort by one spouse against the other, or by a minor child against a parent. The instant appeal followed.

The accident which is the genesis of this suit occurred on July 15, 1965 on the Pennsylvania Turnpike, in Fulton County, Pennsylvania. The defendant was negligently operating an automobile in which her husband and their children were passengers when she lost control of the vehicle. It crashed into a guardrail, left the highway, struck a tree and overturned, injuring its passengers. At the time the accident occurred, the defendant and her family were domiciliaries of Maine.

The United States supplied medical care to the defendant's injured husband and children, as required by law. The reasonable value of the medical care amounted to $2,290.75.

In its Memorandum opinion, accompanying its Order granting summary judgment in favor of the defendant against the United States, the District Court held that since the Moore family was domiciled in Maine when the accident occurred, Maine law was applicable to the instant action under Pennsylvania law.

It construed the Maine family immunity law as *purging* a spouse and parent tortfeasor of any and all liability for negligent tort.

Implicit in the District Court's stated view is a *sub silentio* holding that enforcement of the Medical Care Recovery Act is subject to the vagaries of state family immunity laws.

We disagree with that view.

We are of the opinion that the Medical Care Recovery Act confers on the United States an independent right of recovery which is unimpaired by the vagaries of state family immunity laws; otherwise stated, enforcement of the Act is free of the impact of right-to-sue limitations imposed by a state's family immunity laws.

We disagree, too, with the District Court's view that the Maine family immunity laws *purge* a spouse or parent tortfeasor of any and all tort liability. We do so because the Supreme Judicial Court of Maine has expressly held that Maine's interspousal immunity law does no more than impose a "legal disability" on one spouse to sue another for negligent tort, and that such disability does not operate to *"inflict injustice upon outsiders and deprive them of their legal rights." Bedell v. Reagan,* 159 Me. 292, 192 A. 2d 24 (1963). (Emphasis supplied.)[2]

Since the prime question presented is whether enforcement of the Medical Care Recovery Act is subject to the vagaries of state family immunity laws and their right-to-sue limitations it will be accorded priority of discussion.

Relevant to its resolution is the recent holding of the Fifth Circuit in *United States v. Haynes,* 445 F. 2d 907 (1971), that enforcement of the Act is not subject to the right-to-sue provisions of Louisiana's community property law.

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[2] In *Bedell,* only the Maine interspousal immunity law was involved. In Downs v. Poulin, 216 A. 2d 29 (Me. 1966), it was held that Maine's parental immunity law is analogous to its interspousal immunity law.

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Appendix E

In *Haynes*, the wife of a soldier was injured by his negligence. The Government provided her with medical care as a military dependent and then sued the husband and his insurance company[3] for the reasonable value of the care under the Medical Care Recovery Act. The District Court dismissed the Government's action on the ground that the defendants were free of liability because under Louisiana's community property law the claim of an injured wife for medical expenses is a community claim which must be brought by the husband as master of the community, and that a suit by the husband against himself would be barred.

The Fifth Circuit reversed on the grounds that the Government's right of recovery under the Medical Care Recovery Act is an independent right free of "the vagaries of state law"; "[t]he government's right is independent and is not limited by procedural bars to which others—including Mrs. Haynes herself—might be subject"; "[m]oreover, the marital relations policy behind this state procedure is inapplicable to the federal government"; and "[t]he essential element—'circumstances creating tort liability'—is present." 445 F. 2d 910.

The Fifth Circuit further noted that in *United States v. Standard Oil Company of California*, 332 U.S. 301 (1947), (which led to the enactment of the Medical Care Recovery Act because of its holding that then existing federal laws did not confer a right of recovery for medical care extended to a soldier and that it was up to Congress to enact such a law), it was pointed out that the Govern-

[3] Louisiana law permits joinder of a defendant's insurance company as a defendant.

ment's right of indemnification for medical care (if needed) should *"not vary in accordance with the different rulings of the several states, simply because the soldier marches or, . . . flies across state lines."* 445 F. 2d 910. (Emphasis supplied.)

In *United States v. Merrigan,* 389 F. 2d 21, 23-24 (1968), we held that the Medical Care Recovery Act "unmistakably confers on the government what the Congressional reports describe as an *'independent right of recovery,'* " and, that the Act's "remedial or procedural" provisions *"are not to be construed strictly against the government, but rather in aid of the substantial right which the statute has created."* (Emphasis supplied.) In support of the latter holding we cited *Wyandotte Transportation Co. v. United States,* 389 U.S. 191 (1967), where it was held that when a specific interest and right has been conferred upon the United States by statute, the remedies and procedures for enforcing that right are not to be narrowly construed so as to prevent the effectuation of the policy declared by Congress.

Significantly relevant here is our holding in *United States v. Gera,* 409 F. 2d 117, 120 (1969), that "the Government's exercise of its independent right under the Medical Care Recovery Act *is free of the restraints imposed by a state statute of limitations."* (Emphasis supplied.) It cannot reasonably be contended that a disability to sue by reason of a statute of limitations is different than a disability to sue imposed on a spouse or minor child under a state's family immunity laws.

Other circuits are in accord with *Merrigan* and *Gera.*

Merrigan was cited and followed in *United States v. Housing Authority of the City of Bremerton,* 415 F. 2d 239 (9 Cir. 1969). It was there held that the United States could maintain an action against the Housing Authority under the Medical Care Recovery Act, for medical care extended to an infant child of a serviceman, despite the circumstances that the child's parents could not sue the Housing Authority for its medical expenses by reason of their contributory negligence.

In so holding the Court said at page 241:

> "All courts which have considered the question have agreed that the statute gives the United States an independent right of recovery against the tort-feasor; *the United States is not merely subrogated to the injured party's claim.*" (Emphasis supplied.)

In *United States v. Fort Benning Rifle and Pistol Club,* 387 F. 2d 884 (5 Cir. 1967), the Court held, as we did in *Gera,* that the Medical Care Recovery Act is not subject to the bar of a state statute of limitations which would have precluded the injured party, to whom medical care was extended, from bringing an action.

In so holding the Court said at page 887:

> "We . . . hold that the right of the United States to recover the reasonable value of medical care given to an injured person as a result of the negligence of a third person is not subject to the state statutes of limitations applicable to local personal injury actions. *Limitations has nothing to do with whether the circumstances surrounding the injury create a tort liability in that third person.*" (Emphasis supplied.)

Appendix E

The Achilles heel of the District Court's position is its critical implicit holding that enforcement of the Medical Care Recovery Act is subject to the vagaries of state family immunity laws. That holding eclipses its earlier discussed erroneous concepts that (1) right-to-sue limitations of family immunity laws operate to purge a spouse or parent tortfeasor of all tort liability; and (2) the right of recovery accruing to the Government under the Act is nothing more than a right of subrogation.

The holding that enforcement of the Act is subject to the vagaries of state family immunity laws is grievous error, in utter disregard of the Congressional intent in enacting the Medical Care Recovery Act. Subjection of enforcement of the Act to vagaries of state laws would make a shambles of the Act. As matters now stand, nine of the fifty states in the Union have abolished all family immunity laws, interspousal and parental; seven of the fifty have abolished interspousal immunity only, and four of the fifty have abolished parental immunity. Most of these abandonments of immunity have occurred since enactment of the Medical Care Recovery Act in 1962; a number of them as recently as the past two years.[4]

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[4] STATES WHICH HAVE ABOLISHED ALL INTRA-FAMILY IMMUNITY:

ALASKA: Cramer v. Cramer, 379 P. 2d 95 (Alas. 1963) (Interspousal); Hebel v. Hebel, 435 P. 2d 8 (Alas. 1967) (Parent-child).

CALIFORNIA: Klein v. Klein, 58 Cal. 2d 692, 26 Cal. Rptr. 102, 376 P. 2d 70 (1962) (Interspousal); Gibson v. Gibson, 3 Cal. 3d 914, 92 Cal. Rptr. 288, 479 P. 2d 648 (1971) (Parent-child).

KENTUCKY: Layne v. Layne, 433 S.W. 2d 116 (Ky. 1968) (Interspousal); Rigdon v. Rigdon, 465 S.W. 2d 921 (Ky. 1970) (Parent-child).

Appendix E

The vice of the District Court's position that the Medical Care Recovery Act is subject to the vagaries of state

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MINNESOTA: Balts v. Balts, 273 Minn. 419, 142 N.W. 2d 66 (1966) (Parent-child); Beaudette v. Frana, 285 Minn. 366, 173 N.W. 2d 416 (1969) (Interspousal).

NEW HAMPSHIRE: Morin v. Letourneau, 102 N.H. 309, 156 A. 2d 131 (1959) (Interspousal); Briere v. Briere, 107 N.H. 432, 224 A. 2d 588 (1966) (Parent-child).

NEW JERSEY: France v. A.P.A. Transport Co., 56 N.J. 500, 267 A. 2d 490 (1970); (Parent-child); Immer v. Risko, 56 N.J. 482, 267 A. 2d 481 (1970) (Interspousal).

NEW YORK: Weicker v. Weicker, 28 App. Div. 2d 138, 283 N.Y.S. 2d 385 (1967) (Interspousal); Gelbman v. Gelbman, 23 N.Y. 2d 434, 297 N.Y.S. 2d 529, 245 N.E. 2d 192 (1969) (Parent-child).

NORTH DAKOTA: Fitzmaurice v. Fitzmaurice, 62 N.D. 191, 242 N.W. 526 (1932) (Interspousal); Nuelle v. Wells, 154 N.W. 2d 364 (N.D. 1967) (Parent-child).

WISCONSIN: Bodenhagen v. Farmers Mutual Ins. Co., 5 Wis. 2d 306, 95 N.W. 2d 822 (1959) (Interspousal); Goller v. White, 20 Wis. 2d 402, 122 N.W. 2d 193 (1963) (Parent-child).

STATES WHICH HAVE ABOLISHED PARENT-CHILD IMMUNITY ONLY:

ARIZONA: Streenz v. Streenz, 106 Ariz. 86, 471 P. 2d 282 (1970).

HAWAII: Petersen v. City & Country of Honolulu, 51 Hawaii 484, 462 P. 2d 1007 (1970).

ILLINOIS: Schenk v. Schenk, 100 Ill. App. 2d 199, 241 N.E. 2d 12 (1968).

PENNSYLVANIA: Falco v. Pados, 444 Pa. 372, 282 A. 2d 351 (1971).

STATES WHICH HAVE ABOLISHED INTERSPOUSAL IMMUNITY ONLY:

ALABAMA: Penton v. Penton, 223 Ala. 282, 135 So. 481 (1931).

ARKANSAS: Leach v. Leach, 227 Ark. 599, 300 S.W. 2d 15 (1957).

family immunity laws disregards these simple elementary facts, namely:

The Act is a federal law which creates an independent substantive federal right, enacted by Congress pursuant to its constitutional powers in matters of military affairs and federal fiscal policy.

In ruling that "the scope, nature, legal incidents and *consequences* of the relations between persons in service and the Government *are fundamentally derived from federal sources and governed by federal authority,*" the Court, in *United States v. Standard Oil of California,* said:

> "Perhaps no relation between the Government and a citizen is more distinctively federal in character than that between it and members of its armed forces. To whatever extent state law may apply to govern the relations between soldiers or others in the armed forces and persons outside them or nonfederal governmental agencies, the *scope, nature, legal incidents, and consequences of the relation between persons in service and the Government are fundamentally derived from federal sources and governed by federal authority.* See *Tarble's Case,* 13 Wall. 397; *Kurtz v.*

COLORADO: Rains v. Rains, 97 Colo. 19, 46 P. 2d 740 (1935).

CONNECTICUT: Silverman v. Silverman, 145 Conn. 663, 145 A. 2d 826 (1958).

LOUISIANA: United States v. Haynes, 445 F. 2d 907 (5 Cir. 1971).

NORTH CAROLINA: Bogen v. Bogen, 219 N.C. 51, 12 S.E. 2d 649 (1963).

SOUTH CAROLINA: Fowler v. Fowler, 242 S.C. 252, 130 S.E. 2d 568 (1963).

Moffitt, 115 U.S. 487. *So also we think are interferences with that relationship such as the facts of this case involve. For, as the Federal Government has the exclusive power to establish and define the relationship by virtue of its military and other powers, equally clearly it has power in execution of the same functions to protect the relation once formed from harms inflicted by others.*

"Since also the Government's purse is affected, as well as its power to protect the relationship, its fiscal powers, to the extent that they are available to protect it against financial injury, add their weight to the military basis for excluding state intrusion. Indeed, in this aspect the case is not greatly different from the *Clearfield* [*Clearfield Trust Co. v. United States,* 318 U.S. 363 (1943)] case or from one involving the Government's paramount power of control over its own property, both to prevent its unauthorized use or destruction and to secure indemnity for those injuries." 332 U.S. 305-306 (footnotes omitted) (emphasis supplied).

In its further ruling that a claim by the United States for recovery of its medical care expense, arising by reason of a wrongdoer's conduct, should not be subjected to the vagaries of state law, the Court said:

"Whether or not, therefore, state law is to control in such a case as this is not all a matter to be decided by application of the *Erie* [*Erie R.R. Co. v. Thompkins,* 304 U.S. 64 (1938)] rule. For, except where the Government has simply substituted itself for others as successor to rights governed by state

law, the question is one of federal policy, affecting not merely the federal judicial establishment and the groundings of its action, but also the Government's legal interests and relations, a factor not controlling in the types of cases producing and governed by the *Erie* ruling. And the answer to be given necessarily is dependent upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law. These include not only considerations of federal supremacy in the performance of federal functions, but of the need for uniformity and, in some instances, inferences properly to be drawn from the fact that Congress, though cognizant of the particular problem, has taken no action to change long-settled ways of handling it.

"Leaving out of account, therefore, any supposed effect of the *Erie* decision, we nevertheless are of opinion that state law should not be selected as the federal rule for governing the matter in issue. Not only is the government-soldier relation distinctively and exclusively a creation of federal law, but we know of no good reason why the Government's right to be indemnified in these circumstances, or the lack of such a right, should vary in accordance with the different rulings of the several states, simply because the soldiers marches or today perhaps as often flies across state lines." 332 U.S. 309-310.

Coming now to the District Court's holding that under Maine law "no tort liability exists on the part of Leta Moore arising from this accident":

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The District Court premised its holding on its construction of *Bedell v. Reagan, supra.* The long and short of it is that the District Court misconstrued the *Bedell* decision to hold that Maine's interspousal immunity law purges a spouse tortfeasor of *any and all* tort liability towards *all and sundry.*

Bedell did *not* hold that the Maine immunity law purges a tortfeasor of all liability towards all and sundry. It specifically held that (1) the Maine law does no more than impose a "legal disability" on one spouse to sue the other for negligent tort; and (2) a third party could pursue legal rights of recovery against a tortfeasor although the tortfeasor's wife could not sue him by reason of her "legal disability" to do so.

In making the latter stated holding the Court said in *Bedell:*

> " 'The legal unity of husband and wife and the preservation of domestic peace and felicity between them are desirable things to maintain where they do not produce injustice to the wife and *where they do not inflict injustice upon outsiders and deprive them of their legal rights.' Fisher v. Diehl,* 156 Pa. Super. 476, 40 A. 2d 912, 917. *See, also Kiser v. Schlosser,* 389 Pa. 131, 132 A. 2d 344, 346." 192 A. 2d 26-27. (Emphasis supplied.)

The District Court, regrettably, overlooked the foregoing holding in *Bedell.*

Under *Bedell,* the Maine family immunity laws do not operate to "inflict injustice upon outsiders and deprive them of their legal rights." Here, the United States is an "outsider" possessed of "legal rights" conferred by the

Medical Care Recovery Act, and *Bedell* accordingly would not bar the instant action.[5]

In summary, we are of the opinion that (1) enforcement of the Medical Care Recovery Act is free of the impact of right-to-sue limitations imposed by a state's family immunity laws, and (2) Maine law does not purge a spouse or parent tortfeasor of liability towards all and sundry.

For each of these reasons, standing alone and independently, the Order of the District Court granting the defendant's motion for summary judgment against the United States will be reversed, and the cause remanded to the District Court with directions to proceed in accordance with this opinion.

United States of America v. Leta Moore, No. 19,070.

Biggs, *Circuit Judge*, dissenting.

The majority opinion with an eager and commendable desire to achieve symmetry in the law fails to grasp the essentials of the principle behind the law of Maine[1] as

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[5] The vitality of *Bedell* has not been impaired by later Maine decisions.

[1] The facts of the instant case create a conflict of laws problem, but the law of Maine, where the parties were domiciled at the time of the accident, must govern rather than that of Pennsylvania, where the accident occurred.

At the time of the filing of this suit Mrs. Moore and her family were domiciled in Nebraska. Therefore, the laws of the State, here Nebraska, in which the family resided at the time of the bringing of the suit might well apply. One might also plausi-

expressed in *Bedell v. Reagan*, 159 Me. 292, 192 A. 2d 24 (1963). Not only does the majority opinion fail to grasp

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bly argue that the law of the State of the domicile of the family at the time of the accident, when all rights may be said to have arisen, should govern. I think it is correct to say that the State in which the accident occurred, in this instance Pennsylvania, is the State least involved in familial matters. The liability for doctors' fees and hospital bills might well be governed by the law of the place of the accident, *i.e.*, Pennsylvania, but I cannot deem this to be a compelling reason to disregard all other facets of the case. On balance, I deem the law of Maine to be that which should be applied for the rights of the parties would become fixed at the time of the accident.

The District Court stated that the intrafamilial and interspousal immunity laws of Pennsylvania and Maine were the same. The law of Pennsylvania was the same as that of Maine in respect to claims of minor children against a parent and suits brought by one spouse against another except, as specified in 48 P.S. §111, "... in a proceeding for divorce, or in a proceeding to protect and recover her [or his] separate property. . . ." Pennsylvania has recently abrogated immunity with respect to claims of minor children against a parent in *Falco v. Pados*, 444 Pa. 372, 282 A. 2d 351 (October 12, 1971), but the liability of a wife toward her husband or a husband toward his wife was not altered by the Supreme Court of Pennsylvania because of the Pennsylvania statute of June 8, 1893, P. L. 344, §3, as amended by the Act of March 27, 1913, P. L. 14, §1, 48 P.S. §111. Mr. Justice Eagen stated, 444 Pa. at 384, 282 A. 2d at 357: "In our view, the above statutory enactment prevents the plaintiff, Edward Falco, from recovering damages from his wife in the personal injury action involved, even though his rights are derivative, and even though payment of the damages awarded him will come from her liability insurance carrier via attachment execution proceedings." Cf. *Daly v. Buterbaugh*, 416 Pa. 523, 207 A. 2d 412 (1964).

The parties have stipulated that the domicile of the Moore family at the time of the filing of the instant case was Nebraska.

the essential principle but also goes so far as to create a common law tort for the law of Maine, and a federal common law tort as well under the Medical Care Recovery Act, 42 U.S.C., §2651, *et seq.*[2]

The laws of Nebraska and Maine are similar in substance.

The District Judge found that Mrs. Moore was guilty of negligence. This finding has not been questioned.

It should be pointed out that insofar as the record shows Mrs. Moore has not been sued by any member of her family as the result of her negligence.

[2] 42 U.S.C. §2651 provides as follows: "Recovery by United States—Conditions; exceptions; persons liable; amount of recovery; subrogation; assignment.

"(a) In any case in which the United States is authorized or required by law to furnish hospital, medical, surgical, or dental care and treatment (including prostheses and medical appliances) to a person who is injured or suffers a disease, after the effective date of this Act, under circumstances creating a tort liability upon some third person (other than or in addition to the United States and except employers of seamen treated under the provisions of section 249 of this title) to pay damages therefor, the United States shall have a right to recover from said third person the reasonable value of the care and treatment so furnished or to be furnished and shall, as to this right be subrogated to any right or claim that the injured or diseased person, his guardian, personal representative, estate, dependents, or survivors has against such third person to the extent of the reasonable value of the care and treatment so furnished or to be furnished. The head of the department or agency of the United States furnishing such care or treatment may also require the injured or diseased person, his guardian, personal representative, estate, dependents, or survivors, as appropriate, to assign his claim or cause of action against the third person to the extent of that right or claim. "Enforcement procedure; intervention; joinder of parties; State or Federal court proceedings

Appendix E

I.

The Present Existing Barrier of Absolute Disability Preventing One Spouse From Suing the Other and Children From Suing Their Parents for Negligence.

The rationale of *Bedell* is based on strong principles of equity asserted in a third-party defendant suit bottomed on Rule 14(a) of the Maine Rules of Civil Procedure, giving an enforceable right of contribution among negligent participating or joint tortfeasors.[3]

"(b) The United States may, to enforce such right, (1) intervene or join in any action or proceeding brought by the injured or diseased person, his guardian, personal representative, estate, dependents, or survivors, against the third person who is liable for the injury or disease; or (2) if such action or proceeding is not commenced within six months after the first day in which care and treatment is furnished by the United States in connection with the injury or disease involved, institute and prosecute legal proceedings against the third person who is liable for the injury or disease, in a State or Federal court, either alone (in its own name or in the name of the injured person, his guardian, personal representative, estate, dependents or survivors) or in conjunction with the injured or diseased person, his guardian, personal representative, estate, dependents or survivors."

[3] Rule 14(a)—"*When Defendant May Bring in Third Party.* At any time after commencement of the action a defendant as a third-party plaintiff may cause to be served a summons and complaint upon a person not a party to the action who is or may be liable to such third-party plaintiff for all or part of the plaintiff's claim against him. The person so served hereinafter, called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party

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The law of Maine has erected a barrier of absolute disability preventing one spouse from suing the other and children from suing their parents for negligence. *Abbott v. Abbott,* 67 Me. 304 (1877); *Libby v Berry,* 74 Me. 286 (1883); *Anthony v. Anthony,* 135 Me. 54, 188 A. 724 (1937). The absolute disability extends to suits between a parent and his unemancipated minor child. *Skillin v. Skillin,* 130 Me. 223, 154 A. 570 (1931); *Downs v. Poulin,* Me., 216 A. 2d 29 (1966). The barrier that was in existence in 1877 still remains. *Bedell* has *not* changed the law applicable in the case at bar. In *Bedell,* 159 Me. at 295-96, 192 A. 2d at 26, the Supreme Judicial Court of Maine stated, basing its view on not only Rule 14(a), M.R.C.P., but also on the Reporter's notes as follows: "There is an enforceable right of contribution *amongst*

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defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and his failure to do so shall have the effect of the failure to state a claim in a pleading under Rule 13(a). The third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13. Any party may move for severance, separate trial, or dismissal of the third-party claim; the court may direct a final judgment upon either the original claim or the third-party claim above in accordance with the provisions of Rule 54(b). A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant."

negligent participating or joint tortfeasors: '* * * when the parties are not intentional and wilful wrongdoers, but are made wrongdoers by legal inference or intendment, are involuntary and unintentional tortfeasors * * *. *It is an equitable right founded on acknowledged principles of natural justice and enforceable in a court of law.*' Hobbs v. Hurley, 117 Me. 449, 451, 104 A. 815, 816.

"Maine Civil Practice, Field and McKusick, Rule 14, Reporter's notes at page 186 observes: 'This rule is similar to Federal Rule 14 * * * When a defendant believes that a third person, not a party to the action, *is or may be liable to him for all or part of the plaintiff's claim, he may bring such third person into the case as a party by service upon him of a summons and complaint.* Thus the entire controversy can be settled in a single proceeding. * * * Impleader cannot be used by a defendant who contends that it is the third party instead of the defendant who is liable to the plaintiff.'

"In its commentary applicable to Rule 14(a), Maine Rules of Civil Procedure, 155 Me. 504, and to Rule 14(a) of the Federal Rules of Civil Procedure, Federal Practice and Procedure, Barron and Holtzoff-Wright, contains inter alia the following: '§421. * * * *only a person who is secondarily liable to the original defendant may be brought in.*'" (Emphasis added.)

Who is the negligent participating or joint tortfeasor with Mrs. Moore in this case? Who is the person or persons secondarily liable here? Is Mrs. Moore's innocent husband deemed by the majority to be a tortfeasor? Are the children deemed to be joint tortfeasors with their mother who was driving the car? Insofar as the present record

shows, they were merely passengers. There is no person or persons secondarily liable in the case at bar. This is an important fact which the majority completely overlooks.

I reiterate that the law of Maine has not changed since 1877. In *Potter v. Schafter,* 161 Me. 340, 341-43, 211 A. 2d 891, 892 (1965), decided two years after the decision in Bedell, the Supreme Judicial Court of Maine, after a preliminary reference to the common law upon which Maine's "judicature rests", said: "We are urged to sustain the appeal, grant plaintiff-wife a right to recovery and *thereby judicially legislate a new cause of action.* Lead by Hitaffer v. Argonne Co., Inc., 87 U.S. App. D.C. 57, 183 F. 2d 811, 23 A.L.R. 2d 1366, on which certiorari was denied in 340 U.S. 852, 71 S. Ct. 80, 95 L. Ed. 624 (1950), which granted the wife a cause of action for her loss of consortium of her husband resulting from negligent conduct of a third person, ten other states have followed by judicial decision and one, Oregon, has done so by statute. Meantime nineteen jurisdictions, having considered the question, have denied recovery. See Igneri v. Cie de Transports Oceaniques, 323 F. 2d 257, 260, 261 (2 CCA 1963).

"We are aware that as a common law court we have the power to grant this new cause of action, and we are reminded that in Bedell v. Reagan, 159 Me. 292, 192 A. 2d 24, we exercised this prerogative and held that a defendant in a complaint brought by husband and wife for negligence resulting in wife's personal injury might implead the plaintiff-husband as a third-party defendant, thereby allowing defendant equitable recourse for contribution toward the monetary damage which otherwise

would compensate not only for his own fault, but also 'the pecuniary equivalent of the husband's wrong',—but within the narrow limits prescribed.

"The change in the common law declared by Bedell was not a result, however, of *a collision between the principle of stare decisis and contemporary legal philosophy* above, as is true in the present case. The adoption of our civil rules, effective December 1, 1959, introducing third party practice into Maine, which was a drastic departure from pre-rule procedure, was designed 'to secure the just, speedy and inexpensive determination of every action.' Rule 1, M.R.C.P. In Bedell the court dealt with a collision between Rule 14, M.R.C.P. and *the common law 'disability of reciprocal spouses' as cross litigants.* Bedell, 159 Me. at page 296, 192 A. 2d 24. Under such circumstance we held that the integrity of the civil rules and their declared purpose, but within the narrow limits required equitably in the Bedell situation, overrode the pre-existing rule of marital disability of the common law. There is not only a distinction, but also a difference.

"The proposed creation of a new cause of action in the wide field of torts merits consideration by the legislature,—where upon notice the diverse interests affected by such proposition may be heard. If Maine is to join the minority, though a respectable minority, *it must do so through our legislative branch. Under the facts here, it is not for us 'to usurp legislative authority.'* Sacknoff v. Sacknoff, 131 Me., 280, 283, 161 A. 669. *Representations for a change such as here urged should be directed to the legislature.* * * *" (Emphasis added.) The appeal was dismissed.

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Lest the foregoing be not conclusive, I call attention to *Roberts v. American Chain & Cable Co.*, Me., 259 A. 2d 43, 48 (1969). An interesting analogy is drawn between *Bedell* and the cited case. It was said: "The reciprocal disability of spouses respecting litigation against each other arising from feudalistic customs out of the concept of unity of the parties to a marriage contract has endured to this day as a vestigial remnant of State policy dedicated to the preservation of domestic tranquility. The common law doctrine of unity in marriage has been so eroded during the years by positive legislation that in modern times the status of the spouses has been practically equalized and the unity of marriage concept remains more theory than fact. In realistic terms, we decided in Bedell that '[t]he mystical concept of personal wedded unity and the paternalistic apprehension of domestic discord between the spouses cannot be so compelling as to vindicate' the rule of spousal immunity *from contribution between joint tortfeasors when one of the joint wrongdoers happens to be the spouse of the injured party.*

"The underlying policy supporting the right to contribution between joint tortfeasors espoused by this Court does not rest in contract. We recognize an equitable right founded on acknowledged principles of natural justice that when one has discharged or may be obligated to discharge more than his share of a common liability, he may have contribution from the other joint tortfeasor whose negligence concurred with his in producing the injury."[4] (Emphasis added.)

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[4] At an earlier point, 259 A. 2d at 48, the Supreme Judicial Court stated: "In Bedell v. Reagan, 1963, 159 Me. 292, 192 A. 2d 24, our Court, in permitting contribution from the husband of an

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I again ask the question, who is the negligent participating or joint tortfeasor with Mrs. Moore in the case at bar?

The majority opinion has used *Bedell* to support a conclusion which is totally inapposite. Note 5 of the majority opinion stating that *Bedell* retains its "vitality" is quite true and correct but this is beside the point. The circumstances at bar are different from those of *Bedell* because here no tortfeasor has been joined with Mrs. Moore. The majority states, "Under *Bedell*, the Maine family immunity laws do not operate to 'inflict injustice upon outsiders and deprive them of their legal rights.' Here, the United States is an 'outsider' possessed of 'legal rights' conferred by the Medical Care Recovery Act, and *Bedell* accordingly would not bar the instant action." I do not assert, of course, that *Bedell* bars the instant action; *Bedell* simply does not authorize, sustain, or aid it and is in fact irrelevant for the necessary attendant circumstance of a negligent participating or joint tortfeasor is not present here. In short, the United States is not an outsider possessed of legal rights within the *Bedell* rationale since it is not a negligent participating or joint tortfeasor. The fore-

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injured wife, stated that '[t]he element [of common liability of both tortfeasors to the injured person] should not be a controlling condition or factor when one joint tortfeasor unintentionally and negligently has wrought harm which he is dispensed from righting because of his matrimonial union with the victim but which the other joint tortfeasor not in the marital relation must redress in full to the injured spouse without any equitable right of contribution from the joint tortfeasor spouse. * * * It is of the very object of equity to prevent the application of a universal legal principle in an eventuality where unconscionable and unjustifiable hardship must otherwise ensue.' "

going sums up the ineluctable conclusion that the majority refuses to face.

Certainly in determining whether there exist "circumstances creating a tort liability upon some third person," an important circumstance here is the current law of Maine, under which no tort liability exists vis-a-vis Mrs. Moore. It is not a function of this court to create a new common law remedy for Maine. As the Supreme Judicial Court of Maine has said, this is a function which should be left to the state legislature. But the majority disregards this sound principle and, as has been said, has actually created a new common law remedy and embedded it on the law of Maine.

For the reasons stated the majority opinion is clearly in error on this phase of the case.

II.

The Majority Opinion Also Creates a Federal Common Law Tort and Thereby Allows Recovery to the United States.

Since *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), there have been no federal common law torts in any true sense.[5] It cannot be doubted that Congress intended to give and did give to the United States, if a tort had been committed, an independent right of recovery against the tortfeasor and that the United States is not merely subrogated to the injured party's claim. See *United States v. Housing Authority of the City of Bremerton*, 415 F. 2d

[5] Cf., however, *Hinderlider v. LaPlata Co.*, 304 U.S. 92 (1938), decided on the same day as *Erie R. Co.*, also by Mr. Justice Brandeis.

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239, 241 (9 Cir. 1969). But it was the intention of Congress to compel the United States to maintain its suit through the tort law of the respective States and if state law did not create an actionable tort claim, recovery could not be had by the United States.

The Congressional reference is to the substantive law of the States, which here must be determined to be that of Maine.[6] I say *substantive* law *not procedural.*[7] The language of the statute, particularly the phrase of 42 U.S.C. §2651(a), *"under circumstances creating a tort liability upon some third person,"* (emphasis added) must be construed as a reference to the tort law of a State or territory. It follows that Congress was not looking to a nonexistent federal tort but to the tort laws of the States, and it would seem to be a highly metaphysical argument to contend that intrafamilial or interspousal immunities, while they may be part of the familial law of a State, such as Maine, are not under the circumstances at bar completely applicable to Maine tort law. It would appear that *Erie R. Co.* is applicable.[8] It follows, under the circumstances at bar,

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[6] See note 1, *supra.*

[7] As to the very numerous interpretations of the doctrines, varying from State to State, see *Interspousal Immunity—A Policy Orientated Approach*, 21 Rutgers L. Rev. 491 (1967), and *Negligence-Parent-Child—New York Abrogates Parent-Child Immunity Doctrine, Comment*, 44 Notre Dame Law 1001 (1969).

[8] *The doctrine of Clearfield Trust Company v. United States*, 318 U.S. 363 (1943), seems not applicable here for it is clear that Congress has spoken to make local tort law governing.

In *Clearfield*, supra at 367, Mr. Justice Douglas stated: "In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards. *United States v. Guaranty Trust Co.*, 293 U.S. 340, is

that the creation of liability under Maine tort law cannot be considered apart from the Maine doctrines of intrafamilial and interspousal immunity, such an "apart" consideration being employed to enable the United States to recover. The Maine law must be taken as a whole.

In an article entitled *Public Law 87-693: An Analysis and Interpretation of the Federal Medical Care Recovery Act,* by Eli P. Bernzweig, Esquire,[9] 64 Col. L. Rev. 1257, 1259, 1261-62 (1964), the following is stated under the heading, "I. The Substantive Rights of the United States: A. *Independent Right of Recovery*"—"From the viewpoint of interpreting the legislative history of the act, it is important to note that all of the federal agencies reporting to Congress on H.R. 298 submitted duplicate reports to both the House and Senate Judiciary Committees *based on the language contained in the original bill.* Consequently, the comments in these reports relating to the nature of the right to be conferred on the United States are both irrelevant and misleading if applied to the bill in its amended form. Several agencies, for example, treated that right as a mere derivative right of subrogation, governed exclusively by local law.[10]

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not opposed to this result." In the case at bar there is an applicable Act of Congress. It is 42 U.S.C. §2651(a) and therefore it is not for the courts to fashion the governing rule of law according to their own standards.

[9] Mr. Bernzweig is a member of the New York Bar, B.S. Rutgers University, 1950; LL.B., 1953. He is an attorney in the Public Health Division, Office of the General Counsel, Department of Health, Education and Welfare.

[10] Mr. Bernzweig points out in his cited article, 64 Col. L. Rev. 1257, 1261 n. 23: "For example, the Deputy Attorney General [now Mr. Justice Byron R. White] stated in his report: 'It

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Appendix E

"The statutory scheme is positive and unequivocal: the Government's claim arises when a beneficiary of gratuitous federal medical care suffers injury or disease under circumstances that subject a third person to tort liability. At this point, the Government and the beneficiary possess independent (albeit concurrent) rights of recovery against the tortfeasor. The Government will recover if it demonstrates, in accordance with procedures established by the act, that the third person was, in fact, 'tortiously liable'. Moreover, by creating this dichotomy between two independent causes of action, Congress has provided the Government with greater rights of recovery under certain circumstances than those enjoyed either

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was, therefore, considered preferable to bottom the basic theory of this legislation on the "subrogation" concept, one which is universally recognized, understood, and regularly applied by all courts, and which would more closely conform the rights of the United States, and the procedure for their enforcement, to the local law and practice, whatever it might be.'

The Deputy Attorney General also stated in his letter of August 1, 1961 to Mr. Celler, Chairman of the House Judiciary Committee, 1962 U.S. Cong. and Adm. News 2643, 2644, the following: "[I]f under local law the injured person would have no claim on account of such damages the United States would also have none; if he would have such a claim, the United States would become entitled to that claim, but to no more. This provision would therefore make allowance for even the rare situation where, under local law, a person would have no right to recover on account of medical expenses which he had neither paid nor become obligated to pay."

See the comments of the Department of Health, Education and Welfare and the Comptroller General. S. Rep. No. 1945, 87th Cong., 2d Sess. 10-13, 16-22.

The legislative history, for the reasons stated, is none too helpful.

by the beneficiary or by a common-law 'assignee' or 'subrogee'. The dichotomy also makes clear that the tortious injury suffered by the beneficiary is, in effect, merely a condition precedent to an otherwise independent right of recovery in the Government; it negatives the view that the *procedural infirmities* of the beneficiary's claim under local law may compromise the Government's separate cause of action.

"B. *State Law and the Existence of Tort Liability*

"The Government's right to recover under the act is subject to the condition precedent of 'circumstances creating a tort liability upon some third person'. The question arises whether federal or state tort rules determine the liability of the third person. *Both the act and its legislative history are silent on this matter, but there appears to be little reason to doubt that state law is controlling. The very silence of the act tends to confirm this view: when Congress desires to depart from local law, it usually makes its intention clear in the legislation itself or in the committee reports. For example, the intent to 'occupy' the fields covered by the Jones Act and the Federal Employers' Liability Act led Congress to preempt local law by expressly prescribing standards of conduct that give rise to liability. Moreover, when Congress has remained silent on the issue of governing tort law, as in the case of the Federal Employees' Compensation Act (FECA), the courts have consistently applied local law tort rules. Finally, the FMCRA is designed to allow the Government to recover costs incurred in the operation of its medical care programs, not to regulate the conduct of tortfeasors. Arguments based on desirable uniformity in the achievement of the goals of the act therefore properly relate to mat-*

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ters of collection procedure and to the separate status of the Government's right to reimbursement. Since the act does not purport to establish a single standard of conduct, it neither compels nor suggests the need for the application of a uniform federal law of torts." (Notes omitted; emphasis added.)

Mr. Bernzweig goes on to say that the decision in *United States v. Standard Oil Co.*, 322 U.S. 301 (1947) "does not call for application of federal law under the FMCRA, even though it has frequently been cited for the proposition that federal law controls whenever the Government sues in tort. In that decision, the Supreme Court refused to create a new tort—interference with the government-soldier relationship—as a means of permitting the Government to recoup its medical costs. *However, when Congress acted to create a right of recoupment in the Government by passage of the FMCRA, it did so not by creating a new tort, but merely by conferring a right that arises when a beneficiary is injured by conduct that would have been deemed tortious prior to the passage of the act.*

"The cause of action created by the act, therefore, is simply one where rights under state tort law become material to the application of a federal statute. Typically, the courts have held that a federal statute may be interpreted as permitting such rights to be determined under local law. In the prolific field of federal taxation, for example, the Supreme Court has written, 'State law creates legal interests and rights. The federal revenue acts designate what interests or rights, *so created*, shall be taxed'. The analogy to tax law is particularly persuasive in view of the similarity in nature of the Government's rights under the FMCRA and under the federal tax laws. In each

case the statute is a fiscal enactment designed to give the Government a right to collect monies into the Federal Treasury, and Congress has selected an event (acquisition of taxable income on the one hand, tort liability on the other) which, once it occurs, gives the United States a right to recover. Local law determines the legal relations, and the latter, in turn, create liability under the pertinent federal statute." (Notes omitted; emphasis added.)

So viewed the decisions are pretty much reconciliable and are not as conflicting as first appears. In *United States v. Housing Authority of the City of Bremerton*, 415 F. 2d 239 (9 Cir. 1969), a local statute of limitations was not permitted to bar recovery by the United States. But it should be noted that Judge Hamlin in the cited case stated: "Under section 2651(a) the United States may recover only where there is tort liability in a third person. *Where the injured party is himself negligent, and where under state law that contributory negligence absolves the third person from liability, then the United States cannot recover from that third person.* This is what the statute must mean, and it is to this situation that the language in *Fort Benning* [United States v. Fort Benning Rifle and Pistol Club, 387 F. 2d 884 (5 Cir. 1967)] and *Greene* [United States v. Greene, 266 F. Supp. 976 (N.D. Ill. 1967)] was directed. On the other hand, here the Housing Authority was liable for the infant's injuries, and under state law any possible contributory negligence of the parents was irrelevant to that liability. Thus, the terms of the Act are fully met, and any contributory negligence of the parents can in no way defeat recovery by the United States. It is therefore unnecessary to return the case to the district court for a determination of this issue." (Id. at 243, emphasis added.)

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Appendix E

Our decision in *United States v. Gera,* 409 F. 2d 117, 120 (1969), as the majority opinion points out, concludes that "the Government's exercise of its independent right under the Medical Care Recovery Act *is free of the restraints imposed by a state statute of limitations.*" (Emphasis in majority opinion.) This is nothing more than a refusal to recognize a procedural barrier. To the same effect is *United States v. Fort Benning Rifle and Pistol Club,* 387 F. 2d 884 (5 Cir. 1967), also cited on the majority opinion.

In *United States v. Merrigan,* 389 F. 2d 21, 23-24 (1968), as the majority opinion correctly points out, we held that the Medical Care Recovery Act "unmistakably confers on the Government what the congressional reports describe as an *'independent right of recovery,'* " and, that the Act's "remedial or procedural" provisions *"are not to be construed strictly against the government, but rather in aid of the substantial right which the statute has created."* (Emphasis in majority opinion.) I do not doubt the correctness of this statement, but it is not to the point for the issue remains as to whether the Government's right of recovery arose out of the tort law of the States "under circumstances creating a tort liability upon some third person." In *Merrigan,* however, we held *only* that the United States had the right, after the expiration of six months from the date it began to furnish medical care to the injured veteran, to institute an independent action for the recovery of the cost of that care, even though the veteran had sued the tortfeasor within six months and had reduced his claim to judgment before the United States commenced its action. The broad statement relied on in the majority opinion is dictum, and the issue before us on this phase of the case was not in focus.

We are also aware, of course, of the decisions of the Supreme Court cited by the majority. In *Wyandotte Transportation Co. v. United States,* 389 U.S. 191 (1967), it was held that when a specific interest and right had been conferred upon the United States by statute, the remedies and procedures for enforcing that right were not to be narrowly construed. But in *Wyandotte,* the statute *sub judice,* section 15 of the Rivers and Harbors Act of 1899, as amended, 33 U.S.C. §409, has no relation whatsoever to 41 U.S.C. §2651, and the principal enunciated by Mr. Justice Fortas seems inapplicable in the present case. The case was concerned with the removal of a barge loaded with deadly chlorine containers from the Mississippi River.

United States v. Haynes, 445 F. 2d 907 (5 Cir. 1971), does not support the majority opinion. In *Haynes,* a wife, a military dependent, who was injured by the negligence of her husband was a person injured "under circumstances creating tort liability" upon the husband. Recovery by United States from the husband and his liability insurer was not defeated by the Louisiana law granting a cause of action for the recovery of medical expenses exclusively to the community and therefore to the husband as its master. It must be emphasized that Judge Clark, writing for the Fifth Circuit, stated: "This action, brought by the United States of America under the provisions of the Medical Care Expense Recovery Act, 42 U.S.C.A., §2651 *et seq.,* sought to recover for certain medical services which it was statutorily obligated to render. Since we determine that the Louisiana law which grants the cause of action for the recovery of medical expenses exclusively and solely to the community and therefore to the husband as its master, *is a procedural device which has nothing to do with whether*

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the circumstances surrounding the injury create a tort liability, we reverse the district court." (Id. at 908, emphasis added.)

The distinction between substantive and procedural law is clearly maintained in *Haynes*. While such distinctions may be unwitty diversities, nonetheless they do exist, and I think we must heed them in the case at bar. The judgment of the Court of Appeals of the Fifth Circuit which deals with the law of Louisiana should be deemed to be both expert and correct in its evaluation of that law.

The majority also cite, as did the Fifth Circuit in *Haynes, United States v. Standard Oil of California,* 332 U.S. 301 (1947), in which the Supreme Court made clear what it deemed to be the kind of law that Congress should enact. Unfortunately, Congress did not accomplish what the Supreme Court intended that it should. See note 9, *supra,* and notes 17, 18, 19, 20, 21, 22, 23, 24 and 35-45 cited to the text of the Bernzweig article, *supra.* Congress expressly used the phrase, as I have stated repeatedly, "under circumstances creating a tort liability upon some third person" and made reference thereby to the tort law of the several States.

It should be noted that the majority opinion in its note 4 devotes several pages to a summary of States which have abolished all intrafamilial immunity and States which have abolished parent-children immunity only, and the States which have abolished interspousal immunities only, with appropriate citations and references. I am not able to perceive the relevancy of the contents of this note to the instant problem. In fact, actions by numerous States in obviating the effect of intrafamilial and intra-parental immunities seem to indicate that the States are enacting

statutes to enable the United States to recover by application of the Federal Medical Care Recovery Act to the law of the States, but if the majority position is correct, the changes effected by statute from the common law are unnecessary.

Symmetry is desirable in law, but it cannot be deemed to be an essential of statutory construction.

It is the law of Maine, which the majority misconstrues, that must be interpreted, not the laws of the other forty-nine States. The majority opinion subjects the law of the states to further unfortunate emasculation.

For the reasons indicated I must respectfully dissent.

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Teste:

Clerk of the United States Court of Appeals for the Third Circuit

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19,070

United States of America,

Appellant

vs.

Leta Moore

(D. C. Civil Action No. 69-16)

On appeal from the United States District Court for the Middle District of Pennsylvania.

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Appendix E

Present: Biggs and Kalodner, Circuit Judges and Whipple, District Judge.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel, later submitted and later re-submitted.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed March 27, 1970, be, and the same is hereby reversed, and the cause remanded to the said District Court with directions to proceed in accordance with the opinion of this Court. Costs taxed in favor of appellant.

Attest:
Thomas P. [illegible]
Clerk

October 19, 1972

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19,070

United States of America,

Appellant

vs.

Leta Moore

(D. C. Civil Action No. 69-16)

Present: Biggs and Kalodner, *Circuit Judges*, and Whipple, *District Judge*

Upon consideration of appellee's "Motion for Leave to File Appellee's Petition for Re-Hearing by the Court En Banc Out of Time,"

It is ORDERED that appellee be and hereby is granted leave to file petition for rehearing out of time, not later than December 15, 1972.

By the Court,
(s) Harry E. Kalodner,
Circuit Judge

Dated: November 22, 1972

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19,070

United States of America,

Appellant

v.

Leta Moore

Sur Petition for Rehearing

Present: Seitz, Chief Judge and Biggs, Kalodner, Van Dusen, Aldisert, Adams, Gibbons, Rosenn and Hunter, *Circuit Judges.*

The petition for rehearing filed by appellee in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,
(s) Francis L. Van Dusen,
Judge

Dated: December 27, 1972

APPENDIX H

Judiciary Act. Title 28, United States Code:

Section 1254(1):

Cases in the Court of Appeals may be reviewed by the Supreme Court by the following methods:

(1) By Writ of Certiorari granted upon the Petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

Public Health and Welfare. Title 42, United States Code:

Chapter 32. Third Party Liability for Hospital and Medical Care.

Section 2651:

Recovery by United States: conditions, exceptions; persons liable; amount of recovery; subrogation; assignment.

(a) In any case in which the United States is authorized or required by law to furnish hospital, medical, surgical or dental care and treatment (including prostheses and medical appliances) to a person who is injured or suffers a disease, after the effective date of this Act, under circumstances creating a tort liability upon some third person (other than or in addition to the United States and except employers of seamen treated under the provisions of section 249 of this title) to pay damages therefor, the United States shall have a right to recover from

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said third person the reasonable value of the care and treatment so furnished or to be furnished and shall, as to this right be subrogated to any right or claim that the injured or diseased person, his guardian, personal representative, estate, dependents, or survivors has against such third person to the extent of the reasonable value of the care and treatment so furnished or to be furnished. The head of the department or agency of the United States furnishing such care or treatment may also require the injured or diseased person, his guardian, personal representative, estate, dependents, or survivors, as appropriate, to assign his claim or cause of action against the third person to the extent of that right or claim.

(b) The United States may, to enforce such right, (1) intervene or join in any action or proceeding brought by the injured or diseased person, his guardian, personal representative, estate, dependents, or survivors, against the third person who is liable for the injury or disease; or (2) if such action or proceeding is not commenced within six months after the first day in which care and treatment is furnished by the United States in connection with the injury or disease involved, institute and prosecute legal proceedings against the third person who is liable for the injury or disease, in a State or Federal court, either alone (in its own name or in the name of the injured person, his guardian, personal representative, estate, dependents, or survivors) or in conjunction with the injured or diseased person, his guardian, personal representative, estate, dependents or survivors.

(c) The provisions of this section shall not apply with respect to hospital, medical, surgical, or dental care and treatment (including prostheses and medical appliances) furnished by the Veterans' Administration to an eligible veteran for a service-connected disability under the provisions of chapter 17 of Title 38. Pub. L. 87-693, §1, Sept. 25, 1962, 76 Stat. 593.